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The Radio Regulation Challenge

THE commercial broadcasting industry will best serve itself, in the opinion of the author, by developing through collective action, standards of its own adequate to meet the demands of listeners and to relieve responsible adverse criticism.

BY JAMES M. HERRING

STANDARDS of commercial programs represent the crucial problem of the broadcasting industry today. It is largely by these that the existing system has been, and will be judged. The listener who applauds an especially fine unsponsored program and then excoriates the advertising in a sponsored program he likes to hear may not realize that he cannot have one without the other; but whether he does or not it is likely to have little effect upon his attitude towards the industry.

Public clamor against too much and too blatant radio advertising, against the advertising of products injurious to health, against advertising offensive to the finer sensibilities of listeners, and against certain types of commercial programs should be a warning signal to the entire industry. It evidences the fact that listeners want radio service, but that they want it free so far as possible of objectionable features.

The public nature of the broadcasting service is more fully appreciated today than ever before, and demands are more insistent that the quality of the service be improved. Unless the commercial broadcasters can satisfy these demands, and such demands tend to become increasingly exacting,

they may expect a troublesome future. Dissatisfaction will express itself in the demand for more regulation, or change to alternative systems of broadcasting.

It is trite to say that the two tests by which consumers evaluate public utility services are the level of the rates and the quality of the service, but it is a point of vital importance. In the older utilities managements have long appreciated this fact, and it is a cardinal principle of good management that sound public relations are best cultivated through reasonable rates and good service.

THE broadcasting industry is unique among public service industries in that no charges are made to the ultimate consumers. Accordingly, attention to the quality of broadcasting service is the primary function of broadcasting management. But since the revenues of the industry come from advertisers who merely purchase broadcast time and demand in exchange the broadcasting of an advertising message, this function becomes a complex one.

The sponsors of commercial programs are interested primarily in the sale of the commodities or services advertised, and to them the advertising message is all-important. To the listeners, however, the advertising adds little, if anything, to the value of the program. For the most part it is something the listener must endure if he would obtain entertainment or education, as the case may be. Consequently, the likes and dislikes of the listeners influence only indirectly the quality of commercial programs, and the interests of sponsors and listeners may often be at variance. It is the job of the broadcasters so to harmonize these differences of viewpoint as to reduce to a minimum criticism from both groups, for they need both the sponsors and the listeners. So also is it the task of regulation; for, while the broadcasters use public facilities, and the use of these for private gain can be justified only by service to the listening public, the existing broadcasting system could not be maintained without the support, both for sponsored and unsponsored programs, of the radio advertisers.

WHEN Congress undertook the regulation of broadcasting in 1927, the necessity for some control of program service, other than the standards of technical performance, was appreciated. It was realized, however, that regulation must take one or more of three different forms: (1) A grant to the regulatory body of censorship powers, similar to the editorial powers, which are, and must be, exercised by the owners of stations; (2) prohibition in the law of the broadcasting of specific types of programs; or (3) the setting up in the law merely of a general standard for the guidance of the commission. The existing system of regulation follows mostly the last-named scheme.

The law specifically denies the regulatory commission powers of censorship over radio programs, and prescribes few specific standards, except to forbid the use of profane, obscene, and indecent language over the air, and the broadcasting of announcements concerning contests or gift enterprises dependent in whole, or in part, upon chance. The standard set

up for the guidance of the commission is a general one, that all broadcasting shall serve the "public interest, convenience, or necessity," the commission being empowered to delete stations whose performance, in its opinion, has not measured up to the standard.

How effective has been public control over broadcast advertising and commercial programs under this system?

THE Federal Radio Commission during its existence paid small heed to the matter of broadcast advertising. It objected to certain types of programs and certain types of advertising to the extent that some were eliminated by the offending stations. It even deprived a few small stations of their licenses because of offensive or inordinate amounts of advertising on the ground that such programs were not in the public interest. But on the whole the commission adopted the viewpoint that not having censorship powers it could do little about broadcast advertising except to refuse to renew the license of a station whose programs clearly did not serve the public interest. It was the opinion of the majority of the commission that it lacked the necessary powers to deal with advertising directly.

In response to a resolution adopted by the Senate in the first session of the Seventy-second Congress, the Federal Radio Commission made a study of commercial radio advertising and found that on the whole the situation was not as it had been painted. As to its control over advertising the majority of the commission held that "any plan to reduce, limit, and control the use of radio facilities for commercial advertising purposes to a specific amount of time or to a certain per cent of the total time utilized by the station must have its inception in new and additional legislation which either fixes and prescribes such limitations or specifically authorizes the commission to do so under a general standard prescribed by that legislation." [1]

Regarding the quality of commercial programs generally, while the commission objected to certain types and thus forced their elimination or deleted some small stations, the fact that the commission could take no other action than to refuse to renew the license of a station militated against effective control.

THE Federal Communications Commission, which assumed the duties of the Federal Radio Commission, seems to have taken a broader view of its duties with respect to radio advertising. Recently, there were

[1] Commercial Radio Advertising, Senate Doc. No. 137, 72d. Cong., 1st. sess., p. 33.

¶ "THE *public nature of the broadcasting service is more fully appreciated today than ever before, and demands are more insistent that the quality of the service be improved. Unless the commercial broadcasters can satisfy these demands, and such demands tend to become increasingly exacting, they may expect a troublesome future.*"

summoned to appear for a hearing before the broadcast division of the commission, to determine whether or not their continued operation would serve the public interest, twenty-one broadcasting stations, many of them outstanding ones. The reason for setting the renewals of the licenses of these stations for hearing was that all at various periods had carried, and some still were carrying, programs advertising a product condemned by the Federal Trade Commission as injurious to health unless used "under the direction and advice of competent medical authority." The same product was condemned by the Post Office Department and by the Supreme Court of the United States. Obviously, unless the broadcasters voluntarily agree not to broadcast these or similar programs in the future, the commission can exercise control only through deleting the stations.

The point is made here that regulation of the quality of commercial programs by depriving offending stations of their facilities under the "public interest, convenience, or necessity" clause is at best an ineffective method of control. As a practical matter only the smaller, less important stations are likely to be dealt with in this fashion, or those stations whose programs have aroused widespread criticism.

ALMOST all stations broadcast some programs of good quality; hence, to delete a station is to destroy the good with the bad, with no assurance that the newcomer will have any better service to offer, since the newcomer would face similar difficulties with the advertisers who demand control, at least in a measure, over their own programs. Any commission would hesitate to delete a station merely because certain of its programs were not up to standard.

The defect in the present system is that it provides no practical method of dealing directly with the undesirable features of broadcast program service. But the broadcasting industry should not be lulled into complacency on this account. The significant fact is that effective control, unless the broadcasters themselves make it unnecessary, is likely to be sought in other directions. Such proposals have frequently been made.

More than once the proposal to limit by law all radio advertising within prescribed bounds has reached the halls of Congress, and there have been numerous proposals to limit the amount of time and the periods which might be devoted to commercial broadcasting, as well as to impose specific limitations as to types of commercial programs. Such proposals in so far as they would impose blanket restrictions upon broadcast advertising are ill-advised, since not all programs and not all stations are equal offenders. Many advertisers, agencies, and broadcasters have learned that desired effects may be produced with brief, skilfully handled, inoffensive advertising, and their programs have been improved materially.

REGULATION of advertising in fairness to all requires differential treatment. Successful advertising of certain products needs only the mention of the name of the sponsor or the product, or at best a brief, dignified message, but advertising of many products to be effective must be much

Dictation of Programs by Advertisers

"COMPETITION for advertising revenues by too many stations has forced the owners of stations to accept advertising from almost any source, and has compelled them to accept dictation of programs as well as advertising copy from the sponsors. Today, however, due to the growth in demand for advertising time and the limited number of good hours, broadcasters are in a better position than ever before to raise the standards of commercial programs."

more detailed and comprehensive. Differences of this nature must be taken into consideration if regulation is to protect the industry as well as the listeners, which should be its dual function.

Further legislation governing specifically the types of commercial programs to be broadcast, as well as the hours to be so used, would be even less desirable. Inevitably it would involve a certain amount of standardization of programs, or a stereotyped performance which would destroy the prime quality of the broadcasting service. Standardization of electric or gas service, even of the other communication services, is possible within broad limits, but standardization of broadcasting service, if it were possible, would be extremely undesirable. By its very nature the service requires the free play of ingenuity and showmanship, since programs must be designed to suit the varied likes and dislikes of listeners. Regulation of such things is essentially an administrative, not a legislative, function. Further legislation of this character, therefore, must be deemed by the industry something to be avoided at all costs.

OTHER proposals are of even greater consequence to the broadcasting industry. There have long been in the United States many groups, some of them well-organized, who are inimical to commercial broadcasting and who have no faith in the capacity of regulation to keep it within proper bounds. They believe that our broadcasting system has been developed for commercial exploitation at the expense of its educational and cultural possibilities, and would like to see the system modified radically.

The interests represented range from those who favor the setting aside

of a fixed proportion of all broadcasting facilities for the use of nonprofit organizations to those who advocate government ownership and operation of the broadcasting system. So much clamor has been made over this matter in recent years that Congress, in the Communications Act of 1934, required the Federal Communications Commission to investigate the proposal to set aside a fixed proportion of facilities for educational and cultural uses and to make recommendations as to new legislation, if desirable. The commission has held its hearings and has recommended that no such legislation be enacted, believing that the solution of the problem lies in coöperation between the commercial broadcasters and those interested solely in educational broadcasting. However, the offer of coöperation will hardly satisfy those who believe that broadcasting has been prostituted by commercial interests.

AN important suggestion which has been made in responsible quarters, and one to which the broadcasting industry may well give attention in these days of "yardsticks," is that the Federal government establish a system to broadcast programs of entertainment and education free of advertising. The proposal is to make such a system supplemental to the present privately owned system, but consideration of its possibilities leads to the conclusion that it would be a step in the eventual displacement of commercial broadcasting.

Competition between government and private enterprise inevitably must lead to a vicious struggle for existence with the chances of survival favoring the government. This is especially true in broadcasting where the competition would be more unequal than in most industries, due to the fact that commercial broadcasters in acceding necessarily to the demands of the advertisers would have to include material which in most cases detracts from the appeal of the programs. Such a public system backed by the public treasury and under pressure to expand and broaden the field of operations which seems to characterize public as well as private enterprise could well be merely the camel's head in the tent.

It is not implied here that the above-mentioned proposals represent immediate probabilities. The point is that if further control of commercial broadcasting comes it can only take a form much less favorable to the industry than that under the present system.

THE broadcasting industry must be alive to its social responsibilities, for the best way in which to avoid restrictive regulation from the outside is to make it unnecessary by adequate self-regulation. A broadcasting service, unlike public services which may be standardized, is anything the broadcaster makes it. Thus there is great opportunity for the display of individual talents. But the ultimate test of the value of the service is the reaction of the listeners.

It is significant to note in this connection that the requirements of the listening public have become increasingly exacting, due in no small degree to the very activities of the broadcasters themselves in educating the public as to the possibilities of radio. There

can be no lagging in the standards of advertising or the quality of commercial programs if the industry is to avoid eventual adverse action. It is the thesis of this article that the commercial broadcasting industry will best serve itself by developing through collective action standards of its own adequate to meet the demands of listeners and to silence responsible adverse criticism.

Historically the broadcasting industry has demonstrated little capacity for self-regulation. One of the principal reasons for the enactment of the Radio Act of 1927 was to create a commission with ample powers to resolve the muddle into which the owners of broadcasting stations had brought themselves.

THE decision of Judge Wilkerson, in 1926, holding that the Secretary of Commerce, who then had a measure of control over broadcasting, had no authority to assign frequencies, power, and times of operation, and that stations might choose their own frequencies and operate on them as they pleased, gave free play to forces which threatened the ruin of the industry. Secretary of Commerce Hoover appealed to the broadcasters to coöperate in the use of the limited number of frequencies in the interests of good service, but to no avail. Seldom have the American people witnessed a more brutal display of savage competitive forces in utter disregard of the public interest than that which followed.

From July 1, 1926, when departmental control ended, until March, 1927, when the Radio Act became effective, the number of broadcasting stations increased from 529 to 734. Stations which had come into the field late, and older stations which had received what they considered unfavorable assignments, jumped to the better frequencies, increased power or lengthened periods of operation at will, and altogether created a situation of intolerable chaos.

The same greed and avarice, the same forces which during that unregulated period impelled many owners of broadcasting stations to forget their public service obligations, have since been at work with respect to broadcast advertising.

Competition for advertising revenues by too many stations has forced the owners of stations to accept advertising from almost any source, and has compelled them to accept dictation of programs as well as advertising copy from the sponsors. Today, how-

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ever, due to the growth in demand for advertising time and the limited number of good hours, broadcasters are in a better position than ever before to raise the standards of commercial programs. That some broadcasters are awake to these possibilities is evidenced by some recent activities in the field.

ON May 15, 1935, the Columbia Broadcasting System announced new policies with respect to commercial programs which represent a significant milestone in the progress towards self-regulation. These new policies propose to limit the amount of broadcast time which may be devoted to commercial announcements and to improve the tone of the advertising matter itself. A maximum of 10 per cent of the total broadcasting period may be devoted to the sponsor's announcements, including contests and offers, on programs broadcast after 6 P. M., with an additional allowance not to exceed forty seconds on quarter-hour programs.

The limit for commercial announcements on sponsored programs in the daytime is set at 15 per cent of the total broadcast period, with an additional allowance of forty seconds on quarter-hour programs.

Unpleasantly rapid delivery of the sales message, so as to effect a crowding of excessive material into the period allowed for commercial announcements, is to be prohibited. "No broadcasting" is to be permitted "for any product which describes graphically or repellently any internal bodily functions, symptomatic results of internal disturbances, or matters which are generally not considered acceptable topics in social groups." This policy, in the words of the announcement, "will specifically exclude from the Columbia Network not only all advertising of laxatives as such, but the advertising of any laxative properties in any other product. It will further exclude the discussion of depilatories, deodorants, and other broadcasting which, by its nature, presents questions of good taste in connection with radio listening."

ANOTHER new policy adopted by the Columbia Broadcasting System proposes to eliminate certain types of programs presented primarily for children. Much criticism has been aimed at so-called children's programs recently; and no other criticism should receive more serious consideration from the broadcasters because of the effect of radio on developing youth. While it is true that ideas may differ as to the merits of various types of children's programs, and that too rigid regulation of subject matter and presentation may create undesirable uniformity and standardization, broadcasters have an editorial responsibility to the listening public which they cannot evade. There is little question of the undesirability of programs which develop morbid fears and curiosity and lay the foundation for anti-social behavior in children. Where the sponsors of programs are lacking in social responsibility the broadcasters must restrain them.

The new policies of the Columbia Broadcasting System indicate a commendable desire to face realities, and if wisely and effectively administered should counteract certain tendencies in commercial programs which have been

chiefly responsible for the criticism of commercial broadcasting. It is significant that they have been adopted by a large chain, since the Columbia Broadcasting System exerts great influence, not only because of its example, but because of the control it actually exercises over programs broadcast in all sections of the United States. But no one station, nor even a chain, can alone raise the level of all broadcasting.

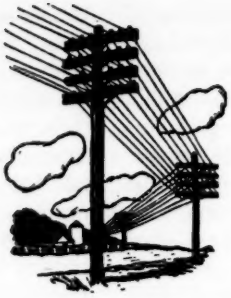
ALWAYS there have been stations which have tried more than others to maintain high standards. The time has come for broadcasters to recognize their collective responsibility to the listening public, and to realize that only through joint action may real results be accomplished. Little would be gained in the large if one station or chain were to raise its standards merely to drive the sponsors to competing stations or chains. The group that takes the lead may be commended for boldness, but it is for the rest of the broadcasters to determine whether or not such a group shall lead the industry to higher achievements or merely be a martyr to unattainable ideals. Through their organizations the broadcasters have an opportunity to do real public relations work in the improvement of the standards of commercial programs.

The broadcasting industry will do well to profit by the experience of other public service industries. "Public be damned" attitudes too often have led to practices which have aroused widespread antagonism from which whole industries have suffered. Public attitudes are not discriminating; the good often suffer with the bad. Abuses stand out and are long remembered, while good service is often taken as a matter of course and does not receive the credit it deserves. These things the demagogue well understands and he makes political capital of them. The broadcasting industry, because of the wide interest in the service and the intimacy of its contacts with the public, is even more susceptible to criticism and must be more responsive to the public will.

THE broadcasting industry is always on trial before the bar of public opinion, and it must continually meet the arguments of those, whether interested or disinterested, who would change the system. The most effective argument it can use is within its own control, if the necessary coöperation can be attained within the industry. The best silencer of adverse criticism is the destruction of whatever basis there is for it.

Commercial broadcasters must see that under the existing system the responsibility for satisfactory standards of commercial programs is theirs, and that this responsibility could not be placed upon the regulatory commission without the expansion of its powers in a manner wholly objectionable to themselves and which would threaten the freedom of initiative which is the chief merit of the present system. Their interests and the fate of the system are bound up with the success of regulation, and this means mostly self-regulation so far as the quality of programs is concerned.

Broadcasters must never forget that the primary purpose for which they are licensed is the performance of a public service.



The Steady Demand for Rural Electrification

No. 2. The Virginia Plan

In the first article of this series the rapid extension of electric service was pointed out and the yearly increase in the number of farms served (see Public Utilities Fortnightly, *August 29, 1935). Article No. 3 of this series will treat of an Arkansas utility's plan for making the service pay.*

By ALLEN J. SAVILLE

Recently the corporation commission of Virginia decided, on account of the renewed interest in rural electrification, to secure up-to-date data as to the existing lines and the possibilities of development of new lines in the rural areas in Virginia. In coöperation with the power companies and the state agencies, a general survey of the state was made.

Rural electric service and methods of making the line extensions to reach the rural customers have been the subject of considerable discussion among various groups in Virginia for several years. In April, 1924, the Virginia Committee on the Relation of Electricity to Agriculture was organized as part of a national movement to investigate the possible uses of electricity in agriculture. This committee, composed of representatives of farm organizations, electric utility companies, the state department of agriculture, and the Virginia Polytechnic Institute, formulated a program of research studies on the application of electricity to agriculture, to be conducted under the supervision of the Agricultural Engineering Department of V. P. I.

Since 1924 this department has been conducting research studies in rural electrification; training men for rural service work with the electric companies; carrying on extension work in rural electrification; and acting in a consulting capacity with the farmers and electric companies on rural electrification matters.

THE STEADY DEMAND FOR RURAL ELECTRIFICATION

Research and investigations have shown conclusively the great importance of electricity in agriculture. As electric power becomes more generally available to agriculture, and its possibilities fully understood by the farmer, it is more than likely that this most convenient and adaptable power servant will play as important a part in improving agricultural practices and rural standards of living as it has already played in improving industrial practices and urban living standards.

Another committee that had also been working on this question, and particularly as to the methods of making the extensions, was the Rural Extension Committee of the Utility Association of Virginia.

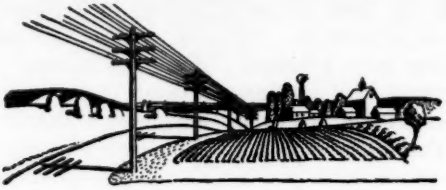
PRIOR to 1929, however, the lack of any uniform plan or policy for making rural line extensions seriously retarded progress in rural electrification. Such extension plans in effect at that time varied greatly among the companies, but generally they all required the prospective customers to *pay the entire cost of the line extensions,* regardless of whether they were located upon public roads or on private property. Even though these plans were found, upon analysis, to be theoretically sound, it was felt that extensions in the rural territory had not developed as rapidly as they should. Presumably this was due to the fact that the average farmer or rural customer had not been in a position to pay the cost of the main line extension itself and then have to wire his house and buy the fixtures and the appliances to use the electricity.

Therefore it was to overcome the above-mentioned handicaps that Governor Harry Flood Byrd called a conference in February, 1929, of farmers, utility, and state representatives interested in rural electrification. As a result of this meeting, the governor appointed a special committee, which was known as the Governor's Joint Committee on Rural Electrification, to study this whole question and to work out, if possible, and recommend a uniform plan for making electric extensions that would be suited to Virginia conditions.

AS a result of the work of this committee, a uniform plan was formulated and recommended to the governor and, in turn, the governor recommended it to the state corporation commission. The state corporation commission approved the plan, which is now generally known as the Virginia Plan for making rural extensions, and it was adopted by all the electric companies operating in Virginia, with the exception of a few small companies who were not in a position to make extensions to their systems.

UNDER this plan during the last five or six years, the power companies have increased their rural electric lines over a thousand per cent over the rural mileage lines prior to this agreement; today there are over 5,800 miles of lines, serving more than 38,000 customers in the rural areas.

Very briefly the main features of the uniform extension plan, as recommended by the Governor's Joint Committee on Rural Electrification and adopted throughout Virginia, are as follows: The utility companies build, own, and maintain, at their own cost,



Increase in Rural Lines under Virginia Plan

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the main line extensions for general use along the public highways or the companies' rights of way to serve rural customers. Service is furnished by the companies to the customers along these lines at exactly the same rates per kilowatt hour as are effective in the city or town from which the extension is made. These customers, however, are required to guarantee a minimum usage of the service, which minimum usage or guaranty is determined on the basis of a certain percentage per month of the total construction cost of the main line extension. The original term of contract is usually three or four years, depending upon the particular percentage adopted by the company, and thereafter the contracts run from year to year unless the total revenues from the line during two consecutive years shall equal, or exceed, the construction cost of the line, in which case the standard minimums of the regular rates apply.

THE great majority of the companies in Virginia adopted a 2 per cent per month guaranty, carrying a 4-year initial contract. We have one company with a 1¾ per cent per month for four years, four companies with a 1⅔ per cent per month for four years, and one company with 2½ per cent per month for 3-year contract periods. It may be mentioned that the plan provides that minimum guaranties are to be adjusted annually if any new customers come on to the lines.

This extension plan was, the commission felt, much better than any of the old plans in effect prior to 1929, for the reason that: (1) It was uniform among all the companies throughout the state; (2) it put the responsibility upon the utility companies to furnish the investment for the extensions for general use; (3) it was much simpler and more easily understood by the farmers than any of the former plans; and, (4) it established a policy on the part of the utility companies which was decidedly more liberal toward rural customers than was the case under any of the older plans.

The power companies and the state agencies, such as the county agents, have been very aggressively behind this program so that to a large extent the lines that are economically sound have already been built. There are projects in process of development, of course, that would normally carry on this program from year to year. The commission, however, in inaugurating the studies on rural electrification this year, was interested in the possibility of some subsidy for this type of development so that the extension of this service could be accelerated. As the result of this survey it was apparent that although the growth had been very rapid and that there was still an appreciable growth each year, there was a possibility under some form of subsidy or grant of renewed activity on those lines that might be thought to be desirable but which on account of the low revenues it was not practical for the power companies to build.

WITH no at-present-known method of carrying on this type of project, the report submitted to the corporation commission in connection with the statewide survey suggests a form of subsidy in order that the extension of rural lines might be expedited. The report presented the following set-up:

> We suggest that a nonprofit corporation be set up, composed of representatives of those groups in Virginia most vitally interested in this project. The stock of this corporation should be all held by some designated agency of the state without any liability as to assessment so that any indebtedness created by the corporation would have behind it only the physical properties owned by it and revenues received from its operations. This corporation to have the power to borrow money, plan, build, lease, sell, or operate rural lines, and do all other things necessary to perform its functions, including the right of eminent domain for right of way.
>
> Under this corporation, if formed, should be grouped all of the lines proposed under all these classifications in order that revenues from the more profitable lines can be used to temporarily support the less profitable lines.
>
> If there is to be a quick development of use of power we believe some consideration should be given to financing that part of the work necessarily done by the property owner, such as his own service line of more than 100 feet from highway or line, the wiring of his own premises, and possibly the purchase of appliances. These are considerable items of costs that can now be financed under Federal Housing Administration repair and renovation loans, but over a long period some other financing may be necessary.

Several factors influenced this type of set-up. The first was the fact that if each county or each group were allowed to organize their own corporation to finance the extension of these lines, it would involve a considerable expense in each case for organization, legal services, and possibly a continuing expense in the supervision of operations. Another factor to be considered was that if a grant were made and these small corporations were organized in various localities, there would be no general control, and development of rural electrification might be definitely one-sided as to sections of the state where interest might be developed for some peculiar reason.

UNDER this suggested corporation, which would be statewide in character, there would be an intelligent and definite plan of development of the state as a whole. In addition the corporation would have technical advice available so that those contemplating a rural extension could get reliable information as to the cost. Moreover, this corporation, under the same technical advice, would undoubtedly build the proper type of line that would have the minimum of mainte-

nance commensurate with the service requirements.

Another feature of this general corporation set-up would be that once having set up a statewide operation there would be no heavy expenses for each individual line for organization, legal, or technical advice.

Still another feature of importance would be that this corporation would be able to make general contracts with all of the power companies in the state for the furnishing of energy and the operation of lines instead of each individual extension having to make its own contract.

Furthermore this corporation, having control of all the lines built under any grant or subsidy, would have some lines that would undoubtedly pay well and some lines that initially would not carry themselves, but by combining their revenues they could build many more lines and serve many more people than could possibly be done by the small individual extensions each having to stand on its own bottom.

THERE should not be any large operating expenses connected with the corporation as a large part of its investigation would undoubtedly be done with technical talent already employed and available.

This suggestion did not attempt to cover all of the details of the operations of the corporation at all, but there are many other incidental advantages to this type of set-up.

This corporate structure was developed by John J. Wicker, Jr., an attorney of Richmond, in connection with a loan from the Reconstruction Finance Corporation for a self-liquidating project in the city of Richmond. It has been approved by the R. F. C.; the project has been completed and is now operating under its provisions. It has proven entirely satisfactory as a method for conducting such an enterprise.

The ultimate disposition of the lines built by the corporation was not discussed in the report, because there could be several methods adopted. One would be gradually to dispose of the lines as they developed to the power companies serving them and with the corporation wholly as a promotional organization. On the other hand, the lines could be held and any profits accruing could be used again for the promotion of the use of electricity by either building lines in sparsely settled areas or by the maintenance and operation of a staff at one of the technical colleges in the state who would devote their time to the analysis and solution of the problems of rural electrification and the use of electricity on the farm.

After all, the set-up of such a statewide corporation with all of its stock owned by some state agency and its affairs directed by those most interested in rural electrification would give a stability to the whole enterprise which is highly desirable. This whole matter, however, is only in the form of a suggestion in the report and has not been adopted by the state corporation commission of Virginia officially.

A third article on THE STEADY DEMAND FOR RURAL ELECTRIFICATION, *by William McComb, will appear in the September 26th issue of this magazine.*

Remarkable Remarks

"There never was in the world two opinions alike."
—MONTAIGNE

W. J. CAMERON

"Nothing that goes to government ever comes back in a way to equalize conditions as between our people."

HAROLD D. LASSWELL
Associate Professor of Political Science, University of Chicago.

"Propaganda begets propaganda, propaganda begets frustration, and frustration (insecurity) begets violence."

BURTON K. WHEELER
United States Senator from Montana.

"I speak for real regulation—not the kind which the past experience of local and state regulatory bodies has proved to be impotent."

JOE H. EAGLE
United States Representative from Texas.

"If there was any lobby here (on the holding company bill) I certainly did not see it or even hear of it. My own opinion is that that is a mere newspaper sensation."

W. T. BATCHELLER
Electrical Engineer, testifying in Federal court.

"Combined power output of plants at the Bonneville and Grand Coulee dams will be insufficient by 1948 to supply the demand of industry for electricity in that area."

ELISHA HANSON
Attorney, American Newspaper Publishers Association.

"For the first time in their history, the American people have seen their government turning to propaganda in myriad forms to win their favor and keep their support."

CARLISLE BARGERON
Political Commentator, Washington (D. C.) Post.

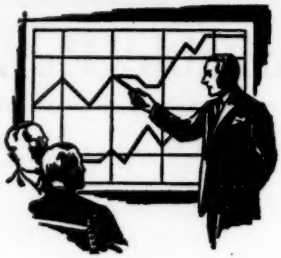
"If a consumer spends 50 cents to send a telegram to a congressman, he will have largely wiped out the great rate reduction which the New Deal is to bring about."

O. W. RIEGEL
Director of Journalism, Washington and Lee University.

"There is some danger of an epidemic of a new nervous malady, propaganditis, which might be diagnosed as a paranoiac hallucination of the citizen that the whole world is conspiring to put something over on him."

FRED J. SISSON
United States Representative from New York.

"I am not going to be buffaloed by propaganda. In each and every instance if my constituents will tell me what securities they hold, I think I can point out to them who got their money, and how and when it was done, and that it was not done by the Roosevelt administration."



Why Multiply Yardsticks?

Would not one be enough if meant for measuring purposes?

Besides, in the opinion of the author, neither the rates of yardstick plants or of any other plants, public or private, are of any value in determining the reasonableness of the rates of various private companies unless operating conditions are shown to be alike, which is practically never the case; that rate comparisons being valueless, the effect of diverse Federal power developments will merely be to put the government into the electric business in competition with the investors in private plants.

By THOMAS F. BALL

Now that some time has elapsed since the New Deal was ushered in as the panacea for economic ills, the people of America are demanding that the administration stop and take stock. Anxious and inquisitive individuals are making this request of the government in no uncertain terms. The Federal government, it would seem, could hardly afford to pass up this more or less popular demand for an inventory of its New Deal measures and effects.

The formation of the American Liberty League was something more than the outward and visible means of expressing the dissatisfaction of a disgruntled minority. Dissensions among the administration leaders would also seem to indicate that all is not well within the New Deal camp.

Realizing from the beginning the necessity and advisability of keeping the American public properly informed as to the policies and plans of the administration, the President has from time to time given out over the radio frank statements concerning the workings of various governmental agencies. He has termed these talks: "Intimate chats on inside government doings."

Yet despite the utmost frankness and sincerity of the President there has been considerable criticism of what he is attempting to do. Some have even gone so far in their denunciation of the Roosevelt policies as to say that all semblance of democracy has disappeared and that we now have in its stead something closely akin to bureaucracy; yes, even to socialism.

OTHERS have vehemently voiced their disapproval of the administration's desire and intention to have the Federal government enter business in competition with its own citizens. Men like United States Senators Smith of South Carolina, Byrd of Virginia, and Bailey of North Carolina have done their utmost in attempting to discredit the so-called Brains Trust. Senator Borah of Idaho for months carried on an independent campaign against New Deal policies with the idea of checkmating, to some extent at least, the bureaucratic tendencies of the present administration. This activity on the part of Senator Borah, it would seem, should be taken seriously because past experiences have shown that he is an indefatigable fighter and one who seldom fails to make his influence felt.

WHILE most of the criticism directed against the Roosevelt administration can be attributed to political enmity and jealousy, it would nevertheless seem that those who object to the government entering into business, thereby jeopardizing invested capital, have sound reasons for their position.

Any attempt on the part of the government to discourage, prevent, or actually hinder the people of this country from engaging in private business would be entirely contrary to the spirit of the American Constitution and of American ideals. Legitimate private enterprises in which a large number of individuals have invested should certainly be accorded the courtesy of fair and impartial treatment. The writer cannot believe that the present administration will persist in an attempt to destroy private investments in what has, up to the present time, been regarded as legitimate private business.

ALTHOUGH the writer holds no brief for those bankers and manipulators of invested funds, who in the past have proven themselves entirely unworthy of public confidence and trust, still he cannot refrain from criticizing the more or less accepted idea that all utilities are to be judged by the operations of the Insull crowd.

No one would condone what the Insull group did. Yet, it seems manifestly unfair that the honestly conceived and operated private utilities, which have been rendering a real service to the American public, should be so branded as to actually discourage further investments in their holdings.

Such action on the part of the government could result only in wholesale confiscation of existing enterprises. This would mean that a large group of citizens, who had honestly invested their moneys in the private utilities prior to the Roosevelt administration, would be unjustly deprived of their holdings.

There is no moral justification for such a destruction by the government of values of the property of its citizens.

THE present administration has attempted to put into effect codes of various kinds so that practically all businesses of any consequence would have to take orders from Washington; yet it did not announce its intention of entering into competition with any of these enterprises, save that of the electric utilities. It seems

a bit strange that this form of private business should be the only one subjected to government competition.

If the electric business is to have competition of this kind, why shouldn't the government enter the oil business, build and operate its own railroads, construct its own systems of communication, and, in general, create competition in all fields of business. The public is more or less interested in all kinds of business since its economic welfare depends upon the success of business enterprises.

ARE the private electric utilities the only ones to be attacked? Perhaps the answer lies in the fact that because the electric utilities are vested with considerably more apparent public interest than other forms of business, they are the first to become the football of politics.

But is there any jusification or fairness in singling out one great industry and holding it up to scorn as the Bad Boy of American business? Private capital—not government subsidy—was the only form of support afforded the early inventors and promoters in the electric field. Not until private capital was induced to lend a helping hand was the electric industry actually begun. Yet the government, which was loath to succor this child in the beginning when money was scarce and risks were large and when its future was uncertain, now when its success is assured seeks to destroy it by entering the field itself.

SOMETHING in excess of $12,000,000,000, it has been conservatively estimated, is invested in the electric utilities of this country. From what source was this vast sum derived? Not from government subsidy, but from private investors. Is it any wonder that these investors should feel grave concern for the future where, in addition to the ordinary hazards of business, they are required to submit to active governmental competition on an enormous scale?

As to New Deal purposes in regard to the power question, the writer has derived very little satisfaction from governmental utterances. One is apt to get the impression that the government is merely seeking to establish so-called yardsticks for the sale of electric energy; whereas the actual purpose appears to be competition with the private electric utilities with the ultimate aim of forcing them out of business. If this were not the true purpose of the administration, why should it establish so many different yardsticks in widely scattered areas of the country? Would not one scientifically conceived and well-planned development, such as the Tennessee

¶ "THE *reasonableness of the rates of government projects cannot be determined by comparison with the rates of private companies, or vice versa, since the government operates on a privileged or subsidized basis. The rates of private companies, for example, do not represent the cost of electric service alone but of electric service and political service. Part of the bill the consumer pays is for taxes.*"

valley project, suffice as a yardstick? Why does the government have to undertake the construction of so many separate and distinct power developments in order to ascertain the fair and just cost of electric energy?

If it be a matter of establishing accurate yardsticks, then there is no escaping the fact that the government has proceeded on the assumption that either the public service commissions are totally incompetent to determine and impose reasonable rates, or that the courts will not permit them to do so. In other words, it seems quite obvious that the government is determined to make mere figure-heads of the public service commissioners and at the same time bring about a concerted attack upon the courts for having upheld the safeguards of the American Constitution which, in effect, have prevented the confiscation of private property.

Is it not exceedingly strange that the government should now be of the opinion that the courts have been entirely incorrect in their interpretation of the Constitution? Is the government hopeful of being able actually to bring about confiscation of the private electric utilities under the pretense of establishing yardsticks?

If the avowed purpose of the administration's power policy is merely a matter of establishing yardsticks, why did the government launch upon such an extensive nation-wide survey of electric power rates? Does it also purpose to check up on the rates which public service commissions have already declared to be fair and just? Is the government, having made this survey at its own expense, going to turn over the results to the various state commissions for their use? While the average American citizen may feel that this is a meritorious rate study on the part of the government, yet he probably fails to realize that it will be of little importance in arriving at the proper charge for electric energy. The rates of private companies must be based on a reasonable return on the necessary capital invested. The rates charged by other companies have no bearing on that question.

The reasonableness of the rates of government projects cannot be determined by comparison with the rates of private companies, or vice versa, since the government operates on a privileged or subsidized basis.

The rates of private companies, for example, do not represent the cost of electric service alone but of *electric service and political service.* Part of the bill the consumer pays is for taxes. It would be manifestly misleading, therefore, to compare a government rate for electric service alone with a rate of a private company for electric service and taxes. Other favored conditions under which the government operates make any attempt to make a private company rate appear unreasonable by comparison with a government rate unfair and defective.

In order to justify the government's nation-wide survey of electric rates by the Federal Power Commission, Basil Manly, vice chairman of the commission, has attempted to set forth some of the reasons for undertaking it. He said:[1]

[1] See PUBLIC UTILITIES FORTNIGHTLY, August 16, 1934, p. 201.

How to Help the Family Budget

"It would seem that if the administration is really anxious to help the family budget, it would accomplish more by devoting its attention to the reduction of extravagant political expenditures than by trying to extend its extravagant methods of operation into the electric field in competition with private capital. A customer who pays $1 for the cost of electric service pays approximately $15 for governmental or political service."

. . . It should be emphasized at the outset that the Electric Rate Survey is not an investigation of the reasonableness of rates charged by private utilities or municipal plants. As far as the private companies are concerned, that is the function of the state utility commissions upon which the Federal Power Commission has no desire to encroach. There is reason to believe, however, that such a compilation and analysis of rates will be of great value to the state commissions in the performance of their statutory duties.

BUT of what help can such a survey be to the public service commissions? If anything is well established by the regulatory commissions it is that rate comparisons are of little value in determining the reasonableness of rates of individual companies; and of no value whatsoever unless operating conditions are the same, which is practically never the case.

Take, for example, the rates of company A and company B. Say the rates of company A are a cent a kilowatt hour higher than the rates of company B. That would not show that the rates of company A were too high—that is to say, unreasonable.

Company A might have underground construction and company B overhead construction which might account for the difference in their charges.

Then again the rates of company B might be *unreasonably low*. New York street railway fares are 5 cents. The Seattle railways, a municipally owned system, charge 10 cents. Although this is double the New York city fare, it does not show that the Seattle riders are being overcharged. An examination of the facts might easily disclose that the New York riders were being charged less than the cost of the service. In no rate case involving the reasonableness of the rates in either city would mere evidence as to what was being charged in the other city be of any value.

Again if company A were shown to be operating efficiently and to be making only a reasonable return on its capital, its rates would have to be declared reasonable no matter what company B might be charging. Like-

wise a government "yardstick" rate would be no more useful in determining the rates of company A than would be a comparison with the rates of company B or any other private company.

ALL this talk about yardsticks and other rate comparisons is pure buncombe. The real purpose of the New Dealers apparently is to socialize the electric business under the camouflage of establishing yardsticks. Anyone who believes that the socialization of the electric industry would be a good thing for the country has a perfect right to advocate it but this socialization should not be brought about by false pretenses.

From the political standpoint the attack on the electric industry is probably made because of the large number of consumers whom it is assumed would be interested, especially domestic consumers. It can hardly be justified on the ground of excessive rates. Most of the rates charged by the private companies have been declared reasonable after elaborate investigations by governmental authorities. The electric companies have made comparatively few appeals to the courts from the rate decisions of the commissions. Even if appeals to the courts could be considered as obstructions to regulation—a manifest absurdity—the electric utilities have been freer than most utilities from that criticism.

THE domestic electric bill is one of the smallest items of the family budget, an average of about 9 cents a day. In spite of the fact that the electric utilities have been compelled to meet the rapidly increasing demands made upon them, the rates for the service have been reduced since 1912 as follows: 32 per cent for retail lighting; 13 per cent for commercial power; and 23 per cent for industrial power. These reductions have very largely been the result of the constantly improved engineering practices, the more efficient generating and distributing apparatus, the increased efficiency of operation, and the increased consumption of electric energy per consumer.

IN striking contrast to this rather surprising reduction in rates, the cost of the government which must be paid in taxes has been constantly on the increase. In 1913 the aggregate cost of all government—local, state, and Federal—amounted to $135 a family. In 1929 this total had grown to the alarming sum of $460 per family, three and a half times the cost in 1913! According to a report of the National Industrial Conference Board:

> More than $500,000,000, or more than one tenth of the total expenditure of local governments in the United States, represents waste and could be saved each year without diminution, either in quantity or quality, of the governmental service now rendered.

IT would seem that if the administration is really anxious to help the family budget, it would accomplish more by devoting its attention to the reduction of extravagant political expenditures than by trying to extend its extravagant methods of operation into the electric field in competition with private capital.

A customer who pays $1 for the cost of electric service pays approximately $15 for governmental or political service. That he is greatly

overcharged for this political service owing to its inefficiency, judged by business standards, is generally conceded. Not even the politicians would deny it. With this conceded inefficiency and wastefulness of political management, the question whether the government could conduct the electric business more efficiently and at less cost to the users of the service than is and can be done by private initiative, is highly speculative.

WHATEVER may be said of the practicability of the operation of small municipal plants, the evidence that large Federal and state business undertakings have been failures from the economic standpoint is abundant. Why then set out to injure a great industry like the electric utilities by subsidized governmental competition involving the expenditure of huge sums of tax money, destroying the value of securities approved by governmental authority and held by millions of people as well as by banks, insurance companies, and fiduciary institutions (involving the interest of millions of others) on the theory that a family that is being charged 9 cents a day for this service is being overcharged or robbed?

It may be all right from the political angle but from the economic standpoint it does not show good sense.

Facts Worth Noting

THERE are 31,289 elevators in the borough of Manhattan, New York. They travel 93,500 car-miles and carry 12,400,000 passengers a day, or about half as many again as all the transit lines in the five boroughs.

* *

TRAFFIC on surface car lines in New York city continued to decline in 1934, the total of 687,200,000 being 14,500,000 below the figure for 1933. This decline of 2.1 was due almost entirely to the substitution of busses for trolley cars.

* *

The first regular passenger and freight railroad station, built in 1830 in Baltimore, Md., was also the first to receive a telegraphic message. It was to this station that Samuel F. B. Morse sent his famous first message "What hath God wrought."

* *

THE world's first streamline ferry boat recently was put in operation between Seattle and Bremerton, Washington. The new carrier, christened the Kala-Kala, or Flying Bird, is 276 feet long and built to accommodate 2,000 passengers and 110 automobiles.

* *

NEW York city's rapid transit and surface railway lines combined showed a gain of 2.1 per cent in 1934 over 1933. They carried 2,504,500,000 passengers, an increase of 51,100,000 over 1933. The rapid transit lines alone, including the city's own system, showed a gain of 3.8 per cent over 1933. The total of 1,817,300,000 was 65,700,000 larger than in 1933 and more than made up the loss of 48,500,000 suffered by those lines in that year compared with 1932.

OUT OF THE MAIL BAG

How to End Crossing Accidents

It has no doubt come to your attention that there has been a recent increase in the number of tragic grade crossing accidents. It is to be expected that every good citizen would want this terrible menace ended and the administration has, with good intentions, already allocated a great deal of public money to eliminate grade crossings. This, in my opinion, is a grave error. Apparently the President has failed to call upon the young but able Mr. Thomas Corcoran to "think this thing through." If he had, I am sure Mr. Corcoran would have explained to the President that it is not grade crossings which cause these dreadful accidents, but the railroad companies.

I therefore propose that Messrs. Wheeler and Rayburn should be commissioned by the President to introduce bills in the Congress which would require all railroad companies to go out of business by the end of five years. Of course, we can naturally expect that Washington would be flooded with protests from angry investors in and operators of railroads. And I suppose we must, unfortunately, put up with an awful howl from the railroad workers who would lose their jobs, but the President must not be impressed by propaganda from such selfish interests. We have a duty to perform and we must do it courageously. All the railroad corporation jobs and dividends in the world are not worth one drop of American blood.

Did I hear you ask, "What would we do for transportation?" Oh yes, there would be a collateral problem but that is fixed up very easily. We'll simply have the Interstate Commerce Commission put out a report calling public attention to the fact that as the railroad companies begin to drop out one by one, a "grave shortage" in transportation looms in the offing. Under these circumstances there would be nothing to do but for the government to take over the operation of the railroads in the "public interest." This would be purely incidental, of course, to our main purpose.

Do I hear you suggest that grade crossing accidents would then start up again? Ah, my dear editor, that is different; that is in the "public interest" and I am sure that victims of such future grade crossing accidents would be much consoled to know that they were being bumped off in the "public interest."

Yours constructively,
—W. T. Rogers,
Shadyside, Maryland.

A Rule for Utility Employees

Mr. Herbert Corey's recent article on government ownership by strategy should be provocative of much searching thought on the part of all who have any part in the utility business. Not all of us may agree with his premise that such ownership can be achieved without some adequate test at the polls. But all of us should carry his line of thought a little farther, and inquire what will have been the controlling factor in making up the mind of the public to support or to reject public ownership when the time for decision is come.

Regardless of past doctrines of public relations counsels or present hopes of utility operating people, it must be agreed that in the final analysis, the public mind will be made up by the cumulative effect of the attitudes and the actions of the employees—the man and woman behind the service.

If that be true, and sober thought should show it to be so, every utility executive should be asking himself—How well prepared are my employees to represent the industry? In most cases, the answer will be—Not very well.

It is true that the utility employees as a whole are emotionally attached to their companies. Their loyalties have been sharpened by experience and proper treatment. But it is doubtful whether as a class the employees have enough factual background to be able to represent the business before the public. Their hearts may be in the right place, but what about their heads?

This state of affairs constitutes a twofold challenge to the management of the industry. Management must first come to realize that the battles to preserve the right to exercise a control over its own destinies will not be won in the lobbies of national and state capitols, nor in the courts of the land. The future of the public utilities will be determined by the man on the street.

The second, and the more important and difficult, is that management must take the necessary steps to make sure that the part of the organization that comes most frequently and most effectively in contact with the public is intelligently and sympathetically prepared to advance the proper interests of the business. This calls for some mental house-cleaning, and an intensive, comprehensive educational program directed towards providing each employee in the organization with an adequate factual background, as well as a live interest in the affairs of his company.

An undertaking of this kind will not only serve the best interests of the business in preparing its employees to meet with the public, but it will also aid in banishing differences and cementing loyalties within the organization. Furthermore, it will do this in the only way we can reasonably hope will be permanent, that is on the basis of enlightened interest, enthusiasm, and coöperation.

In the public utilities as a whole, we have had altogether too much of the "Come, come now, Old Fellow!" type of personnel management. It is high time the industry gets down to facts, and discovers that it can never find the answer to its personnel and public relations problems in a policy of bandying glib banalities, and greasing the palms of its employees.

The future calls for hard facts. The man of the future will be he who can look a fact in the face without flinching, and use it. Loyalties within the business, and support from without, can better be secured through intelligent appreciation and use of knowledge than through a constant beating of the drums of prejudice and emotions.

The challenge to the utilities is unmistakable. If they want to keep the management of the business in the hands of management, and the affairs of the employees in the hands of the employees, they can do so only by properly educating the various factors of the business in the nature and proper discharge of their full obligations.

(Signed)
UTILITY EMPLOYEE.

Facts about the Gas Utilities

PENNSYLVANIA'S natural gas supply, based on the present rate of production and consumption, will be exhausted in 100 years, according to Dr. George H. Ashley, state geologist.

* *

THE average accuracy of the 172 meter readers employed by a Chicago gas utility was 99.96 per cent for the 9,925,808 readings made during 1934. In other words, a customer could use gas service for 208 years without the liability of having an error made.

* *

ONE thousand six hundred million cubic feet is the estimated daily waste of natural gas in Texas. This exceeds by 60 per cent the daily consumption of the entire United States, or more than enough waste daily to supply the needs of a city the size of Chicago for an entire year. The gas wasted is equal in thermal power to 740 carloads of coal, enough to make a train 8 miles long.

Financial News and Comment

By OWEN ELY

A Lull in Utility Refunding Operations

FOLLOWING the heavy offerings in June and July the refinancing movement has experienced a marked lull in recent weeks. Apparently this slowing down is merely in the nature of a temporary "breathing-spell" to permit the market to properly "digest" the large issues of the past few months.

In the utility field one of the last important issues was the $15,000,000 Southern California Gas Co. First Mortgage & Refunding 4s due in 1965, sold early in August at 101½ to yield about 3.92 per cent. The bonds were offered by a syndicate headed by Blyth & Co., Inc. The company, which is controlled by Pacific Lighting Corp., serves the city of Los Angeles and nearby communities, with about two thirds of its gross revenues derived from operations in the Los Angeles metropolitan area. Throughout the depression net earnings have remained in excess of twice fixed charges and for the twelve months ended March 31, 1935, were equal to 2.9 times present annual fixed charges. The city of Los Angeles is contesting the right of the company, under its present franchise, to distribute gas for purposes other than illumination. The lower courts have ruled against the company, and it seems possible that a franchise tax may be imposed.

An issue of $425,000 First Lien and Refunding Mortgage Gold bonds, 4 per cent Series, due 1954, of Bangor Hydro-Electric Co. has been placed privately through Edward B. Smith & Co., E. W. Clark & Co., and the Maine Securities Co. as agents for the company.

Among utility refinancing issues scheduled for nearby offering, an outstanding issue is that to be sold by the Philadelphia Suburban Water Co., for which the registration statement has been filed and underwriting arrangements completed. The company plans to issue $16,900,000 First Mortgage 4s due in 1965 through a syndicate headed by Hornblower & Weeks. Holders of existing securities will be given the privilege of accepting the new bonds prior to the general public offering (an issue recently raised by the SEC). For the calendar year 1934 interest charges (on the new basis) were earned 2.2 times after depreciation. The company supplies water to 38 municipal subdivisions adjacent to Philadelphia.

Duke-Price Power Co., Ltd., controlled by Aluminum, Ltd., plans to refund $35,529,000 First Mortgage 6 per cent bonds due 1966 into a new issue carrying a lower interest rate, according to the *New York Times*. While the exact terms of the issue have not yet been announced, it is believed that the amount will exceed $25,000,000 and that a 4½ per cent coupon is being considered.

Public Service of New Hampshire will offer $5,400,000 4s due 1960, through competitive bidding.

Savannah Electric & Power has registered an issue of $4,500,000 5s due in 1955 with the SEC; the offering syndi-

cate will be headed by Stone & Webster and Blodget.

Other possible offerings are $3,000,000 Coast County Gas & Electric 4s of 1965, $3,000,000 Laclede Gas Light 6s of 1942, and about $4,000,000 Railway & Light Securities Co. convertible bonds.

$45,000,000 Municipal Plant Still Sought by La Guardia

THE board of aldermen of New York city is expected to pass a bill to submit Mayor La Guardia's project for a $45,000,000 city power plant to the voters at the November election. Previously it had been thought that settlement of the long-pending Consolidated Gas rate-reduction issue would sidetrack the mayor's project, but, according to the *Times,* Democratic leaders

> decided that such a policy could have an unfavorable reaction and furnish ground for expected Fusion charges that Tammany and its allies are linked with the power interests. Such charges, it was pointed out, might imperil Democratic control of the board of aldermen, the entire personnel of which must be elected this fall. . . .
>
> After the aldermen have approved the referendum proposal, if they do, it will go to the board of estimate for action. Here, it is said, the outcome is considerably more obscure. Twice, in recent months, the board of estimate has voted down the project. . . . In view of this situation, it was considered possible that the estimate board, whose members do not have to run for reëlection until 1937, might refuse to authorize the referendum. . . . There is a strong belief in political circles that even if the referendum is approved by the aldermen and the board of estimate it would still be defeated by the voters. The proposal that the city should build a plant to supply current to consumers in Manhattan between Fourteenth and Seventy-second streets, and possibly to sections of other boroughs as well, will be bitterly resented by a substantial part of the electorate, it was pointed out.

Electric Output and Revenues Continue to Gain

THE weekly figures for electric output continue to mount to new record levels, the week ending August 10th showing a gain of nearly 10 per cent over last year and about 5 per cent over the corresponding week of 1929, according to the bulletin of the Edison Electric Institute. The largest gain was in the Rocky Mountain district, with 37 per cent over last year, and the smallest that for the Pacific Coast, with a gain of only 5.5 per cent. The New England and Middle Atlantic states gained a little over 7 per cent, while the Central Industrial, West Central, and Southern states increased about 10 per cent.

The latest available monthly bulletin, that for the month of June, showed a gain over last year in sales of kilowatt hours to domestic consumers of 8.9 per cent, to retail commercial users of 4.3 per cent, and to large commercial consumers of 3.7 per cent. The average gain (including other sales) was 4.5 per cent, but owing to rate reductions (averaging 3.7 per cent for residential use), total revenues from ultimate consumers gained only 2.8 per cent. The gain for the twelve months ended June 30th was 3.8 per cent, however.

Progress of Traction Unification in New York City

SINCE the review of the New York city traction situation in the last issue, the *New York Times* has reported:

> The "understanding" between the city's negotiators and those for the B. M. T., calling for sale of the company's properties at a net price of $185,000,000, will expire on October 1st, but may be renewed if both groups agree. It is now a certainty that no unification plan—even one including the B. M. T. properties only—can be reached by that date.

This delay is apparently inevitable despite the "intensive drive" by Judge Seabury to reach an agreement with the Interborough interests. According to the *Times:*

> The chief obstacle in the way of an "understanding" with the Interborough and Manhattan companies has been the demand of the stock equity interests, represented by Samuel Untermyer, former special coun-

sel to the transit commission, for a price of $60,000,000. Some time ago, however, it was reliably reported that this group would be glad to take $45,000,000 for its holdings.

One of the apparent stumbling blocks in the negotiations is the problem of making the board of transit control bonds (to be issued in exchange for certain traction securities), of sound investment calibre. Traction interests are urging that earnings from the city's independent subway system be used as additional security for interest and amortization on bonds to be issued by the board, but it is understood that Mayor La Guardia has been opposed to such a course.

Another difficulty is the question whether approximately $100,000,000 New York city bonds to be issued under the plan (about $45,000,000 to B. M. T. and $55,000,000 to I. R. T.) can safely be issued under New York city's legal debt limit. The city's present margin within its debt limit is only around $300,000,000 and it is hopeful of exempting the traction issue so as not to encroach on present borrowing capacity. (Such exemption would have to be obtained from the appellate division). It is claimed that on the basis of present traffic, plus savings resulting from unification, the combined system would earn over $7,000,000 a year over all operating charges (including service charges on city bonds and board of transit control bonds).

$57,000,000 Sixth Avenue Subway Construction to Commence October 1st

CONSTRUCTION of the $57,000,000 Sixth avenue subway in New York is expected to start October 1st, the first section extending from 49th to 39th street. Work on the other five sections is expected to be under way by the end of 1936. The completed line would extend from 53rd street to 4th street, and would link the 53rd street crosstown line of the city's independent system with the 8th avenue route.

The right of way of the Hudson & Manhattan will probably be used under Sixth avenue between 33rd and 4th streets, the railroad's 33rd street terminal being remodeled and its 28th street station being discontinued. Under a tentative agreement Hudson & Manhattan would receive a first payment of $300,000 to be supplemented by additional payments as the work proceeds. The city plans to build two sets of tracks, one on each side of Hudson & Manhattan's; later the city may construct two more sets at a lower level, the municipal line then taking over the tracks now used by the railroad.

Construction of the new line is to be financed by the city without Federal aid, since PWA rules would require completion within a year. City corporate stock will be used to make all payments under the contracts and later a bond sale will be held.

Peoples Gas Handicapped by Natural Gas Contract

OF the three large "Insull" operating companies, Peoples Gas, Light & Coke has made the poorest showing during the depression as regards earnings per share of common stock:

	1929	1934	% Decline
Commonwealth Edison	$13.84	$5.19	63%
Public Service of Nor. Illinois	16.04[1]	2.85	82%
Peoples Gas	11.26	1.28	88%

[1] Excluding subsidiaries.

It is difficult to analyze Peoples Gas operations in recent years because of the admixture of natural gas and the use of the word "therm" (instead of cubic feet) to indicate its gas output. The company began to mix natural gas with manufactured gas in October, 1931, thereby raising the heating content or B. T. U. per cubic foot by an estimated 50 per cent. Thus the use of the therm (100,000 B. T. U.) makes it difficult to compare the output in cubic feet. In 1931, which reflected about

nine and one-half months on the old basis and two and one half on the new, total output was 238,000,000 therms, while by 1934 this had increased to 449,000,000 therms. Most of the gain, however, was in gas supplied "on interruptible supply basis," this amount increasing from 21,000,000 to 133,000,000 therms. Rate reductions in the middle of 1933 helped cut down the 1934 increase in revenues to only 10 per cent compared to a gain of 61 per cent over 1933 in the number of therms.

The company's contracts for natural gas are very complicated. It is associated with Standard Oil Co. of New Jersey, Southwestern Development Co., Cities Service, Texas Co., and Columbian Carbon in control of the main pipe line to the Texas fields. It is difficult to appraise the future earning power of the company until present uncertainties regarding the natural gas contracts, taxes under dispute, etc., are cleared up. Undoubtedly the new management, which succeeded the Insull interests, has placed the company's accounts on a conservative basis.

The new 3 per cent gross sales tax effective around the middle of this year, will, it is estimated, cost the company about $1.20–$1.50 per share on the common stock, and this added burden, while not fully felt in 1935, may temporarily offset gains in earnings due to business expansion.

At its present price around 40 (range this year about 44–18), the stock is selling for about 32 times the $1.25 estimated for the current calendar year by *Standard Statistics*. Either this estimate is unduly conservative or purchasers of the stock are willing to discount a substantial recovery in earnings based on rate adjustments and increased volume.

Diversity of Form in Earnings Statements

WHILE most of the large utility companies now report earnings "for twelve months ending" each month or quarter, there is considerable diversity of practice regarding the release of other interim figures. A recent tabulation of twenty-nine leading companies showed no figures yet available for periods ending with June for International Hydroelectric, Standard Gas & Electric, and Utilities Power & Light. Of the remaining companies all but four issued statements for the twelve months ending June 30th. Five issued reports for the month of June, fourteen for the quarter ending June 30th, and nine for the six months ending June 30th.

It would be of great aid to investors and financial analysts if greater uniformity could be attained in issuing monthly figures.

Latest Earnings Reports Make Irregular Showing

A COMPILATION of earnings reports published for leading companies for the twelve months ended June 30th shows gains for the following companies in per-share earnings:

	1935	1934
American Gas & Electric	$1.78	$1.75
American Power & Light Pfd.	3.34	1.89
Electric Power & Light Pfd.	0.29[1]	1.03[1]
North American	1.13	1.03
Pacific Lighting	4.05	2.27
Commonwealth Edison	5.58	5.30
Edison Elec. of Boston	9.89	9.56
Stone & Webster	0.54[1]	0.84[1]
United Gas Corp.	0.65[1]	0.70[1]

Companies showing decreases were the following:

	1935	1934
American Light & Traction ..	$1.05	$1.52
American Water Works	0.87	1.38
Commonwealth & Sou. Pfd.	5.35	5.73
National Power & Light	0.82	0.94
Niagara Hudson	0.44	0.71
United Gas Improvement	1.12	1.22
United Light & Power	0.81[1]	0.68[1]
Brooklyn Union Gas	5.28	5.58
Consolidated Gas of New York	2.10	2.57
Consolidated Gas of Baltimore	4.11	4.17
Detroit Edison	4.38[2]	5.69[2]
Peoples Gas, Light & Coke ..	1.01	2.32
Public Service of No. Illinois	2.69	3.14

[1] Deficit.
[2] 12 months ended July 31st.

Control of Utilities Power & Light Passes from RFC to Atlas Corp.

In the July 18th issue we commented upon the fact that the RFC had obtained a controlling stock interest in Utilities Power & Light Corp., and thus indirectly through the latter's British subsidiary was in effect selling gas and electricity to 503 municipalities in Great Britain. This control of a British company by an agency of the United States government had been objected to by a member of Parliament. It is therefore of interest to note that on July 11th the RFC transferred control of Utilities Power & Light to Atlas Corporation, a well-known investment trust. The latter exchanged 5 per cent debentures of Utilities Power & Light, which it had accumulated in the open market, for the Webster Securities Corp. notes held by the RFC. The Webster Securities Corp. controls Public Utilities Corp. which in turn controls Utilities Power & Light. Chairman Jones of the RFC stated that representatives of the government agency had resigned from Public Utilities Securities Corp. President Odlum of Atlas Corp. stated that the Webster notes were taken purely as a temporary investment and that his company had no intention of exercising control over Utilities Power & Light Corp.

Indications of Stabilization in Expenses and Taxes

A number of utility earnings reports for recent months show signs pointing to a leveling off of the upward trend of wage and material costs and taxes. With power output for the week ended August 24th nearly 12 per cent above that for the corresponding 1934 week and the outlook apparently favoring a continuation of this upward consumption curve, only an adverse expense trend and lower rates appear to stand in the way of a rise in net income. For many companies, of course, rate reductions early this year or in recent months will to some extent neutralize the effect of the gain in consumption, but with the increase in costs and taxes checked, only a relatively small percentage addition to gross might mean a marked gain in net.

For the month of June, American Water Works & Electric Co. reported a decline in the ratio of expenses and taxes to gross earnings amounting to about 4 per cent, compared to a 6 per cent increase in the expense and taxes ratio for the six months ended June 30th. For July, the ratio of net income to gross for Minnesota Power & Light was about 55.9 per cent whereas for July, 1934, it was 55.5 per cent. For Pacific Power & Light Co. July net (after taxes) amounted to 40.7 per cent of gross against 39.7 per cent for the year-earlier month. For Columbia Gas & Electric in the three months to June 30th consolidated net operating income was equal to 27.2 per cent of gross revenues against about 24 per cent for the similar 1934 period. Potomac Edison (American Water Works & Electric system) reported for the three months to June 30th consolidated net earnings from operations equal to 31.4 per cent of gross, whereas in the year-earlier quarter the ratio was only 30.9 per cent.

Water Works vs. Electric Earnings

While it is obvious that the demand for water lacks the benefit of the dynamic influences working toward increased consumption of electricity, the general assumption that water company earnings have remained comparatively immune from the deflationary effects of the depression is hardly supported by the record of the American Water Works & Electric system. Gross income for this company's water subsidiaries in 1934 was about 12 per cent less than in 1930 and net income showed a decrease of about 30 per cent, whereas for the electric division gross was about 16 per cent lower and net 28 per cent less.

What Others Think

More Discussion of Modern Regulatory Technique

So widespread seems to be the approval of the so-called Washington Plan for *quasi* automatic regulation of utility rates that it is necessary in the interest of accuracy to note that such approval is by no means unanimous. Probably the most ably written dissent from the chorus of approval of this plan (under which electric rates have been cut every year for the last ten years in Washington, D. C.) comes from C. O. Ruggles, professor of public utility management at the Business School of Harvard University. He states:

> There appears to be a popular impression, if such a plan can be universally adopted, that we shall have an effective automatic control of rates and that our regulatory troubles will largely be at an end. This is a remarkable shift in our psychology from our early childlike beliefs that rates could be definitely fixed in a franchise for fifty years or at least that statutory control, such as the New York 80-cent gas law, was a satisfactory method of controlling public utility rates. This psychological shift and yearning for an automatic device to control rates reminds one of the faith of an individual who, after suffering for some time with a serious malady, finally relies upon a patented medicine which is guaranteed to give a permanent cure within a very short time. It will be well for us to realize once and for all that there is no royal road to public utility rate making.

Professor Ruggles reminds us that England had tried the sliding scale—profit-sharing method (which is the essence of the Washington Plan) three quarters of a century ago and it is still to be found in the Sheffield Gas Act of 1855. He notes that striking changes in prices and other important changes in economic conditions have made it necessary for England to "regulate" the plan itself, for it was found that while the plan was working out fine (for the public) during a period of falling costs, Parliament had to come to the rescue when increasing costs started to increase utility rates. The Boston Consolidated Gas Co. also copied the English sliding scale prior to the adoption of the Washington Plan, only to seek rate relief from the Massachusetts commission during the war-time increases in operating costs in 1918.

The first and probably the most obvious objection to the Washington Plan is the fact that it assumes in the very beginning as a premise for its operation the accomplishment of what is the nub of nearly all rate cases—the finding of an agreed rate base. Professor Ruggles said that this difficulty inheres in the Washington Plan regardless of whether one uses the prudent investment theory or the present fair value theory of rate valuation. He notes that even the advocates of prudent investment who are seeking a so-called stable rate base recognize the need for varying the rate of return with changes in economic conditions.

But, he continues, "There is no real economic difference in trying to keep the rate base stable and varying the rate of return or in following the opposite policy. It is the product of these two factors that is of vital concern." For that matter, Professor Ruggles believes that "valuation is of little use in attempting to work out a forward-looking marketing program." He charges that adoption of a valuation first, then the attempt to make rates conform to it is putting the cart before the horse. The professor does not mean by this that cost should be eliminated as an impor-

tant factor in rate making over long periods of time, but that in giving recognition to cost in rate making, *past costs* are not the determining factor.

On the other hand, future costs determine the extent to which a public utilities market can be developed. This, in turn, means that pioneering must be the essence of an aggressive marketing policy. All of which demands funds, and any operating company which does not make adequate provision for such funds to be used in the developing of its market will not be able to reach low costs through large scale operations. (This statement applies where a holding company interested primarily in finance has siphoned off revenues from an operating company.)

PROFESSOR Ruggles suggests at this point some general principles might be worked out to meet these regulatory problems. He states:

> The impatience of the public with the long drawn-out "reproduction valuations" is well founded. And yet, the varying of the rate of return also presents difficulties. If a fair return over fat and lean years is to be sought, it may be necessary to allow a return in prosperous years that will seem to the public quite unfair, for they will not at that time have so vividly in mind the low earnings or even deficits of the lean years. If prudent investment could be varied with the swings of the price level by means of properly constructed index numbers, and the rate of return kept at a point considered fair for public service industries, the *time element* could be brought within fair limits, and with very careful supervision of utility accounts it would take away the incentive to concoct many unreal elements which are now presented for inclusion in a cost of reproduction rate base. This plan, if properly constructed index numbers for each type of utility were worked out, would probably be recognized by the courts even under the present law.

The wholesale power market represents important difficulties in the adjustment of rates and changed economic conditions and also with regard to the use of simplified and uniform rate schedules. On the surface, it would appear equitable for a domestic consumer to demand that wholesale power consumers should pay somewhat proportionate rates for service (making due allowance for quantity consumption and demand factors). Professor Ruggles proves that the problem is not so simple as it seems. For it would be distinctly against the interest of domestic consumers to make such a high charge for industrial power that large customers would install their own power plants. In this light, the TVA schedules (which provide that any deficit incurred in serving domestic consumers should be made up by surcharges on commercial and industrial consumers) were held by Professor Ruggles to be unsound. In view of the fact that industrial consumers will not pay more than it would cost them to generate their own power, loss of such customers would injure the domestic consumers themselves by preventing the power utility from making full utilization of its plant by curtailing the size of its operations, thereby increasing unit cost of power.

FOLLOWING this, Professor Ruggles concludes that the demand for some automatic adjustment of rates or for simplicity and uniformity in rates does not give adequate recognition to fundamental economic principles. Reasons: (1) rate schedules are complex because sound economics demand that they should be if they are to serve segments of markets having different characteristics; (2) flexibility in rates for radically different types of markets cannot be secured on a sound economic basis through such a simple device as the so-called Washington Plan. Professor Ruggles adds, "without great varying all electric rate which are now being used by progressive companies, the 'average' rate would mean little and there would doubtless be little gained by trying to use an automatic scheme instead of having direct adjustment of the various rates by a regulatory body."

Professor Ruggles concedes that the ends sought through the Washington Plan are highly desirable, that rates should be flexible in accordance with changes in economic conditions and that a rate of return should have some rela-

The Charleston Gazette

MILKING THE COW

tion to efficiency or inefficiency in management. He adds, "The solution then must be sought through intelligent and effective regulation for which there is no reliable substitute." While there is no reason why regulatory bodies should not make reasonable and intelligent use of labor-saving formulæ, the constant changes of the economic forces affecting rate making (especially for the wholesale market yielding more than one fourth of total revenue) call for the highest type of managerial and regulatory ability and judgment.

Next to the Washington Plan, probably no other variation of rate regulation has been more subject to widespread recent discussion than temporary rate fixing. Such discussion has been prompted chiefly by the problems aris-

ing from the drastic economic changes resulting from the current depression.

Of course, so-called "emergency rate" clauses existed in a number of state regulatory acts as far back as some of these acts were drawn, but it is a fair assumption that they were intended for a different purpose than to meet the expediences of rate fixing during a serious and lasting depression. Since most of them appeared in or were carried over from railroad statutes, they were probably intended to give the state commissions some leeway in allowing immediate rate changes made necessary by sudden changes in operating costs, such as might result from a war or a severe drouth.

But the need for temporary rate fixing that occurred during the depression was, if one might use a somewhat paradoxical term, demanded more "lasting" and elaborate provisions. Mr. Pincus Berkson, whose interesting sympathetic discussion of the validity of temporary rate fixing occurred in the May issue of *St. John's Law Review,* describes the problem as follows:

> The conventional basis for calculation in rate determination is that rates shall be fixed at such levels that the total revenues from them shall be sufficient to cover reasonable operating expenses, plus a proper allowance for depreciation, plus a fair return upon the fair value of the property used and useful in the public service. As these elements fluctuate with changing price levels, adjustments are necessary to keep rates and price levels abreast of each other. It often becomes necessary to make temporary adjustments, by way of temporary rates, pending the final determination of a rate proceeding. Otherwise, existing rates, no matter how excessive or inadequate they become because of changed conditions, would have to remain in effect until the final determination of the rates after a long and involved proceeding. Such conditions especially arise during periods of economic crisis. Our present depression is an example. Overnight, the whole economic structure seemed to have crumbled into a junk heap. The rate schedules adjusted to fit conditions prevailing before this economic debacle became wholly out of line with the sudden and unexpected devaluation that followed. This change required immediate and drastic reduction in rate schedules as soon as it became apparent that the depression would be a prolonged one.

As a member of the New York bar, Mr. Berkson is naturally interested in the temporary rate regulatory statute adopted by the legislature of that state last year. This new § 14 of the New York Statute is perhaps a model of its kind for giving up-to-the-minute temporary rate powers to the state commission. It is independent of, and in addition to, the older § 72 which will probably be used by the commission for "permanent" rate fixing. Below are the main differences between the two sections as set in juxtaposition by Mr. Berkson for purposes of comparison:

Basing his argument on the liberal language used by the United States Supreme Court in Los Angeles Gas &

Section 72	Section 114
Rate Base	
Capital actually expended and such other relevant facts as affect proper determination of the present fair value of the property.	Original cost less accrued depreciation of physical property used and useful in the public service.
Rate of Return	
Must be sufficient to provide a reservation for surplus and contingencies together with a reasonable average return upon the present value of property as a rate base.	Must be sufficient to provide a return of not less than 5 per cent on original cost of property less accrued depreciation as a temporary rate base.
Power to Offset and Correct Errors in Temporary Rates When Fixing Final Rates	
No provision. (The temporary rates being final for the period they remain in effect, cannot affect final determination.)	The effect of temporary rates are to be considered in final determination.

Electric Co. *v.* California Commission and Lindheimer *v.* Illinois Bell Telephone Co., Mr. Berkson believes that the original cost basis for temporary rate making would not be declared invalid by a court which has professed to be more interested in results than methods.

UNFORTUNATELY, Mr. Berkson did not, at the time of the writing of his article, have the advantage of knowing the court's decision in the recent Maryland Bell Case. However, it might be reasonably argued that the respective valuation methods attempted in the Maryland Bell Case and the Los Angeles Gas & Electric Case are fairly distinguishable. In The Maryland Bell Case, the commission had attempted a system of *quasi* automatic valuation, using commodity indices, which the court thought arbitrary. On the other hand, the New York temporary rate statute goes no further than to require the use of original cost pending final rate-base appraisal, which is certainly no more of a departure than the rate-base procedure used by the California commission in the Los Angeles Gas & Electric Case.

Going from legal to economic argument, Mr. Berkson feels that original cost (of all other measures of utility property value) is the most desirable for temporary rate fixing because of its twofold virtues of stability and accessibility. He points out that recasting future rate schedules on the basis of past performance of old and perhaps entirely differently organized rate schedules is uncertain enough in itself. To complicate it with the additional requirement that future rates yield a given return on a variable rate base makes the task of the regulatory commission border on clairvoyance.

Since, Mr. Berkson argues, there is a constitutional requirement that rates yield a fair return in the future on a fair rate base, is it not a logical policy to have a trial period, so to speak, whereby tentative schedules, arranged so as to meet the requirement (as nearly as the commission can forecast) can be tried out? If they turn out as anticipated, final ratification can then be made on a more confident basis than a guess. If inequities or deficiencies are revealed, these too can be adjusted in the final order. In a word, Mr. Berkson would substitute actual experience for mere hypothesis.

THIS temporary rate method functions in three successive steps according to Mr. Berkson's analysis: (1) the requirement that the utility maintain a perpetual inventory of property showing original cost, and depreciation data; (2) the ascertainment of the tentative rate base; to wit, original cost less depreciation; (3) the fixing of the temporary rate of return.

Mr. Berkson makes out a good defense of the legality of the first and last steps (his opinion on step number 2 being already covered). Whatever may be the practical objections to the perpetual inventory, the legal right of the state to insist upon it seems sound enough. The recent decision of the New York Supreme Court, Appellate Division (overruling classification of accounts ordered by the commission) even admitted this point although it objected to specific unauthorized phases of the commission's order which might or might not be subsequently corrected by the legislature. On the question of fixing the rate of return, Mr. Berkson states:

> The only limit imposed upon the commission in fixing such rate of return is that it must not be less than 5 per cent. There is no limit placed upon the maximum rate of return. Heretofore, utility commissions usually treated the rate of return as the static and fixed factor in rate making. The new statute, in order to facilitate prompt action, makes the rate base the stable element. Of necessity, the rate of return must become the variable and adjustable factor. By this means high price levels may be offset by appropriate upward adjustment in rate of return.

When all is said and done, however, isn't the difference between the two methods suspiciously close to the difference between Tweedledum and Tweedledee, as Professor Ruggles has

The Montana Record-Herald

IF HOLDING COMPANIES FOLLOWED THE NEW DEAL MORAL CODE

already observed? However, Mr. Berkson feels that time could be gained if the commissions could adopt the relatively consistent and readily available rate base right off and then use its own judgment on varying the rate of returns. For temporary purposes this may be true. Certainly the courts would be likely to be somewhat more liberal in passing upon a temporary rate than a permanent one but it is a mistake to believe that a temporary rate is not subject to constitutional prohibitions against confiscation. The U. S. Supreme Court has held that an economic emergency gives the government no new constitutional powers. By analogy, confiscation is no more justifiable because

it is temporary than if it were permanent. If this were not true, perhaps the Blue Eagle would have continued flying high.

F. X. W.

SOME ASPECTS OF PUBLIC UTILITY RATE MAKING. By C. O. Ruggles. *Harvard Business Review.* Summer, 1935.

REVITALIZING RATE REGULATION. By Pincus Berkson. *St. John's Law Review.* May, 1935.

The Quebec Side of the Power Control Issue

AN interesting viewpoint on the repudiation by the Province of Ontario of its contracts to take wholesale supply from private generating companies in Quebec was ventured by John Morse, president of the Canadian Electrical Association, addressing the recent convention of that body at St. Andrews-by-the-Sea, P. Q. Mr. Morse stated:

> Certain parties in authority, having too pessimistic an outlook for the growth of power loads in Ontario, consider that the obligations incidental to the purchase of Quebec power represent burdens to Ontario consumers and handicaps to Ontario's industrial future.
>
> I do not think there is a person here who believes there is the slightest justification for such a conclusion. Ontario's industrial, domestic, and rural power requirements are bound to increase in the future as they have in the past. It is only a matter of a very few years when all the power contracted for will be needed. Not only is this true but it will also be only a matter of a few years longer when the Hydro will be experiencing growing pains so severe that it may once again be forced to call upon the rivers of Quebec for relief.
>
> I, therefore, think any fair-minded student of power conditions must realize that the publicized basis for forcing a readjustment of these power contracts was wrong in essence—wrong because there was no justification for the assumption that present-day power loads will not increase; wrong because effective legal contracts should not be threatened simply because they may prove temporarily burdensome to one of the parties thereto; wrong because the sanctity of contractual arrangements was violated; wrong because the usual recourse to the courts by the injured party was denied; wrong because a precedent was made possible which might encourage any party to a contract to attempt to repudiate it simply because it is temporarily burdensome.

THE *Montreal Gazette,* editorially approved of Mr. Morse's address in part as follows:

> The reference in this address to the repudiation of power contracts by Ontario and to the power development activities of the United States government are of particular interest. Not only does Mr. Morse condemn the action of Ontario from the standpoint of the sanctity of contractual arrangements; he declares it to be unnecessary since the power requirements of the province are bound to increase in the near future and within a few years there will be a market for all the power for which contracts have been made. The United States power ventures are enumerated and are criticized from the point of view of efficacy, of commercial practicability, and of market needs, and Canadians are warned against being misled by public ownership propagandists who cite these projects as something which Canada should emulate. The whole of Mr. Morse's address is of interest because it is the first public announcement from an authoritative source since power distribution and prices have come into the political spotlight in Ontario and Quebec. It should clear up a considerable number of popular misconceptions.

The Ontario government by act of its legislature had refused to carry out the contracts on grounds that they were executed by members of a former political party in control of provincial affairs in collusion with private power interests in Quebec.

—E. S. B.

ADDRESS by John Morse before 45th annual convention of the Canadian Electrical Association. St. Andrews-by-the-Sea. June 26, 1935.

INFORMING THE PUBLIC. Editorial. *The Montreal Gazette.* June 27, 1935.

Who's Taking Utility Service?

AMONG the Federal government projects inaugurated in 1934 and directed by the Department of Commerce was a housing survey known as the Real Property Inventory. Under the general supervision of the Census Bureau, bands of previously unemployed "white collar" workers invaded 64 American cities and rang door-bells up and down the streets in an intense effort to find out precisely how American families of various income levels are housed. The purpose of this study was, presumably, to assist in the rehabilitation work being promoted by the Federal Housing Administration. As a by-product, however, the investigators gather information on the way American families have invested their money, if any;—or, to use the official phraseology, "a survey of consumer use of selected goods and services by income groupings." The result is probably the first analysis of its kind ever attempted in this country and the findings developed more than justify the expense and trouble taken to collect the information.

At this writing, only three studies of the 64 cities studied have been completed, but these first three reports contain much food for thought for manufacturers, builders, government officials, social workers, and finally for gas and electric utilities. The three cities completed are Austin, Tex. (containing 15,554 families of which 1,697 were studied); Fargo, N. D. (containing 7,250 families—1,403 studied); and Portland, Me. (containing 18,179 families—3,097 studied).

In Austin, the report tells us that nearly half of the families had incomes of less than $1,000 a year. However, 63 per cent of the white families received more than $1,000 while only 8 per cent of the Negro families and 27 per cent of the "remaining group" (chiefly Mexican) had in excess of $1,000. In Fargo, N. D., and Portland, Me., the number of families other than white were too negligible for notice. In Fargo, 34 per cent of the families studied had less than $1,000, and in Portland, 35 per cent were in the same class.

PROBABLY the most interesting facts brought out by these reports, as far as the readers of PUBLIC UTILITIES FORTNIGHTLY are concerned, have to do with the relative distribution among these families of such common-place house facilities as heating apparatus, fuels for heating and cooking, lighting, plumbing, refrigeration facilities, and automobiles.

Here are some of the total percentages picked at random from the three reports:

AUSTIN, TEX.—1,697 families reporting. House heating: 95 per cent use stoves instead of furnaces; 75 per cent of the white families heat with gas, while 90 per cent of the Negroes use wood fuel. For cooking, about two thirds of all families use gas fuel. For lighting, electricity is used in 82.7 per cent of all classes of homes, but only 78 per cent have bathtubs or showers. Of those without bathing facilities, 90 per cent have less than $1,000 annual income. Only 16 per cent of all families have mechanical refrigeration, but automobiles are owned by approximately 60 per cent.

FARGO, N. D.—1,403 families reporting. In marked contrast to figures from mild-temperatured Dallas, frost-bitten Fargo shows 90 per cent central heating plants for all families—mostly hot air systems. Coal is used by 85 per cent for heating and oil by 12 per cent. Gas is used for cooking by over 80 per cent of the families, while less than 1 per cent cook with electricity. On the other hand, more than 99 per cent of all families use electricity for lighting. Yet about 12 per cent still lack bathtubs or showers—mostly in the low income groups. Seventy-one per cent are without mechanical refrigerators, but only 38 per cent are without automobiles.

PORTLAND, ME.—3,097 families reporting. Over 70 per cent of all homes have central heating plants (the steam

system being the great favorite), and 80 per cent use coal—12 per cent, oil—for heating. Gas is used for cooking by over 74 per cent but only 15 per cent use electricity. For lighting, however, electricity ranks over 98 per cent. Less than 11 per cent have mechanical refrigerators, and slightly over half the families lack automobiles.

Space forbids a further analysis here of the interesting details of the above gross percentages, classified according to various income levels, and according to tenant and home-owning groups. Such refinements should prove a great value to industrial and sales organizations because it clearly shows just where the greatest demand exists for different commodities with due regard to the purchasing power.

ONE fact that struck this reviewer with great force is the relatively high degree of saturation in all classes for electrical lighting and gas cooking as compared to the consumer use of other facilities which appear to be just as essential to ordinary well-being; such as, for example, bathing facilities. Electricity may be badly needed on the farms, but these reports clearly show that whatever may be the rates charged for gas and electricity in these cities, the great majority of consumers of all income classes have to become able to afford these utility services.

It does not appear that as much can be said of some other desirable commodities. This naturally raises the question of whether the Federal government, with its intensive campaign against utilities allegedly in the public interest and the "more abundant life" for the individual, might not be employing its energies to better purpose by seeing that these city people, almost all of whom already have electricity, are given the opportunity of taking baths regularly. Why not "A Bathtub for Every Home by 1938"—as a swell campaign slogan? Our good citizens apparently need them more than kilowatts.

Anyway, the Bureau of Foreign and Domestic Commerce deserves great credit for doing an honest and useful job in making the facts known. When we have the reports on all the other cities available, we'll probably be better able to determine whether or not there is merit in our political suggestion. We may turn it over gratis to both the Democrat and Republican parties, and if neither of them wants it, we will tuck it away very carefully in our So What file.

—E. S. B.

CONSUMER USE OF SELECTED GOODS AND SERVICES BY INCOME CLASSES. Separate Reports for Austin, Tex., Fargo, N. D., and Portland, Me. 10 cents each. Bureau of Foreign and Domestic Commerce, Washington, D. C.

Notes on Recent Publications

A RESTATEMENT OF FUNDAMENTALS. By Randolph Eide, President, Ohio Bell Telephone Co. *Telephony.* July 27, 1935.

Telephone executive predicts the future of the telephone industry and the problems that beset commission regulation.

DEATH TO UTILITY HOLDING COMPANIES. Editorial. *The New Republic.* June 26, 1935.

IS THE SALMON INDUSTRY FACING DOOM? *The Literary Digest.* August 3, 1935. Northwest fishermen cast worried eyes at huge power dams being built across the Columbia river; fish may become extinct unless means of passage to spawning places are provided.

PROGRESS AT BONNEVILLE. *Engineering News-Record.* July 4, 1935. Interesting account of the technical problems and excellent progress being made on this Columbia river project.

PROGRESS OF TELEVISION. *Telegraph and Telephone Age.* August 1, 1935.

THE HORNS OF DILEMMA. By Paul Severance. *The Commonweal.* August 2, 1935.

A discussion to the effect that the TVA is showing a way for electric rate reductions which will come to stay.

TVA AS THE PEOPLE SEE IT. By Herbert Corey. *Nation's Business.* August, 1935.

The March of Events

Municipal Plant Loan-Grants

PWA Administrator Ickes, in an effort to facilitate action on applications from municipal electric plants has been developing what is known as the Power Division of the PWA.

J. D. Ross, superintendent of Seattle's municipal plant, was appointed chief consulting engineer of the division. Samuel Becker of Milwaukee, a PWA attorney, will head the legal section, and K. Sewell Wingfield, PWA engineer, will be assistant director under Dr. Clark Foreman. Mr. Ickes has also commissioned a group under Assistant Administrator Horatio B. Hackett, who is visiting the West inspecting various projects.

Renewed PWA activity on municipal plant applications also was noted. Loan-grants were made for four new electric plants and two existing municipal plants—a total of $788,950. In addition, $186,800 was allotted for a natural gas system. The allotments for electric plants were: Delta, Colo., (pop. 2,938)—$197,000 for steam plant, purchase of distribution system of Western Colorado Power Co. and installation of street lighting system. Pauls Valley, Okla., (pop. 4,235)—$212,000 for generating station and distribution system. Wynnewood, Okla., (pop. 1,820)—$65,000 for Diesel plant. Both towns are served by the Oklahoma Gas & Electric Co. Phillipsburg, Kan., (pop. 1,543)—$120,450 for Diesel plant and distribution system; now served by Kansas Power Co. Staples, Minn., (pop. 2,667)—$82,000 for additions to municipal plant. Lubbock, Tex., (pop. 20,520)—$112,500 for additions to municipal plant. The natural gas allotment went to Las Cruces, N. W., (pop. 5,811) for a transmission line and distribution system.

Following that, allotments for municipal plants from the new public works fund were almost nonexistent. One grant of $15,750 was made to Orlando, Fla., (pop. 27,330) for new power line poles for its municipal plant.

Death Sentence Compromise

THE famous Senate-House fight over the so-called "death sentence" in the Rayburn-Wheeler holding company bill was finally terminated when the House, on August 23rd, in the closing moments of Congress, approved a compromise, 219 to 142.

Under the compromise, a holding company can operate only a single integrated system of operating concerns unless the Federal Securities and Exchange Commission determines that economy, efficiency, or other considerations make exceptions to the rule advisable. The compromise followed direct intervention by President Roosevelt in the form of a letter to Chairman Sam Rayburn of the House Foreign and Interstate Commerce Committee to the effect that he would approve the compromise finally adopted. Prior to that time, House and Senate conferees had been hopelessly deadlocked over the death sentence clause for over a month, during which the House membership had voted four times against the original death sentence, as it appeared in the bill approved by the Senate.

The controversial "death sentence" clause, which the Senate approved by a single vote, and which the House repudiated three times by big majority votes, was the principal cause of the conflict. Advocates and opponents of the "death sentence" clause blamed each other for the deadlock. Those who favored the Senate's position have said that the House was swayed by utility propaganda in the form of alleged messages from constituents and that the House version of the bill was more open to question on the grounds of constitutionality than the Senate version. Those who favored the House position, on the other hand, accused the Senate of being a tool of a stubborn administration which could have had a bill for effective regulation if they sincerely desired it, but was more intent on having things exactly its own way regardless of the views of the majority of Congress.

With utilities thus looming as a political issue, Washington observers point out that rates for utility service, which would serve for a time as the keynote of administration attacks upon utilities, are largely fading into the background and that the real issue—public ownership—would come to the front.

The foundation for this was seen in the action by the House in adopting a resolution authorizing the President to invite the World Power Conference to convene in the United States sometime during the year 1936–37. Observers see in this the laying of a foundation for propaganda in favor of government ownership which, naturally, is stimulated by the presence of European experts at the opportune time.

Meantime, during the closing days of Congress the House and Senate committees, investigating lobbying for and against the holding company bill (mostly against), furnished some comic relief in an atmosphere otherwise surcharged with political tension. After a squabble between respective chairmen, Senator Black and Representative O'Connor, over the

jurisdiction of a witness, H. C. Hopson, actual head of the Associated Gas & Electric system, heated up to a point where threats of contempt action actually passed between the two houses of Congress, a compromise was effected whereby Mr. Hopson testified before both committees. He admitted that he had fought against the Wheeler-Rayburn Bill and that his system's fight had cost around $800,000. He felt that the expenditure was justified because of the dire consequences to industry he expected to result if the Wheeler-Rayburn Bill were enacted—at least in its original form. Many of the committeemen, particularly Senators Black and Schwellenbach, thought quite differently about the matter. And so utility men look forward to being very much in the political eye.

TVA Amendments Passed

THE administration had mostly its own way on the TVA amendments when conferees of the House and Senate agreed to a report which was subsequently adopted by both houses of the recent session of Congress. The only concession made to the House conferees was the elimination of a provision authorizing outright purchase by the TVA of power distribution systems. However, authority was given TVA to lend funds to municipalities with which to make such purchases. TVA is also authorized to use part of its $50,000,000 bond issue (cut from $100,000,000 in the original bill) for such loans. Rejected was a House amendment which would have prevented TVA from building its own transmission lines until after efforts have been made to purchase parallel lines, if any, of private companies.

Other authority granted to the Tennessee Valley Authority under the agreement was: (1) to sell all surplus power; (2) to retain $1,000,000 and revenues necessary for current operations; (3) to inspect and report independently upon audits of TVA books by the Comptroller General; (4) to regulate power sale rate schedules; (5) to pass on private power developed on the Tennessee river and tributaries; (6) to develop a 9-foot channel in the Tennessee river from its mouth to Knoxville, and (7) to make emergency purchases without competitive bidding.

Puerto Rican Legislation

THE governor of Puerto Rico in August signed several bills passed by the island legislature in July, including a revenue bond act and others in a group of bills sent out by the PWA.

Incidentally, it was learned that Dr. Ernest Gruering, an emissary of the Federal administration, had been sent to the island to see what can be done with an allotment of $40,000,000 said to have been made to the Puerto Rico Reconstruction Administration. Puerto Rico is divided into 77 districts known as municipalities, and nearly one third of these are served by municipal electric plants. The new revenue bond act covers only water, sewerage, gas, and electric plants.

EHFA Bill Passed

APPENDED as an amendment to the Federal Emergency Farm Mortgage Act, passed by the recent session of Congress, was a bill introduced by Senator Norris of Nebraska to extend the life of the Electric Home and Farm Authority until 1937. This continuation was said to be required to give full force and effect to a recent Executive order transferring the assets and liabilities of the old Delaware corporation to a new District of Columbia corporation.

Rivers and Harbors Bill Passed

IN the closing days of the recent session, both houses of Congress adopted a conference report adjusting differences on a bill authorizing $528,168,573 for rivers and harbor projects.

The House specifically passed an authorization of $13,000,000 for the Parker dam and $10,000,000 for the proposed Head Gate Rock dam on the Colorado river, and $63,000,000 for the Grand Coulee dam on the Columbia river. The total authorization under the bill finally amounted to $614,168,573.

Alabama

Negroes Appreciate TVA

NEGROES of the Tennessee valley and surrounding territory gathered at Athens, Ala., on August 10th, for a "Negro TVA Appreciation Day," in honor of the first anniversary of paychecks from TVA to Negroes in that section.

Representative Mitchell, Negro Democrat member of Congress from Illinois, delivered the principal address, taking as his subject "The New Deal—the Salvation of the Country and the Salvation of the Negroes."

Professor G. R. Bridgeforth of Trinity College for Negroes at Athens, was credited with suggesting the idea of a Negro appreciation day and was active in making arrangements for the celebration.

Suits Block City Plants

ATTORNEYS for the Alabama Power Company have appealed to the Alabama Supreme Court from a lower court's dismissal of its plea for a permanent injunction to prevent the cities of Tuscumbia and Sheffield from borrowing PWA funds to construct electric distribution systems. The utility also is seeking an injunction in the District of Columbia Supreme Court against the Public Works Administration et al. to prevent loans to those cities and to Decatur and Florence, Ala.

Arizona

Water Loan Approved

PRESIDENT Roosevelt placed the final stamp of approval on the Salt River Valley Water Users' Association's $6,000,000 loan for construction of a dam on the Verde river and improving spillways on the Salt river dams. Bids have to be called before construction can be started. The dam will be built for the benefit of lands now under cultivation. Plans for the Verde river dam have been under consideration since last April and the loan was first approved in Washington the latter part of July.

Arkansas

Utility Opposes City Plant

THE Arkansas and Missouri Power Company moved to restrain the attempt of the town of Luxora to establish municipally owned power and water plants with PWA funds, at an acrimonious protest hearing before W. W. Mitchell, PWA examining engineer, in the PWA offices in the Rector building.

The hearing which was recessed to allow both sides to file briefs, developed that:

(1) The power company, provided Federal funds are forthcoming, is prepared to fight the case to the United States Supreme Court on the grounds that Arkansas law does not permit municipally owned companies to compete with privately owned utilities.

(2) Luxora residents are not dissatisfied with either their power or water rate, but they are bitterly dissatisfied with their water service which, they declared, has caused fire insurance rates to skyrocket in Luxora.

Luxora has on file with PWA headquarters applications for a $55,000 loan for a water plant and $78,110 for a power plant. At present, there is no power plant in Luxora, the Arkansas and Missouri Company transmitting the power over high tension wires.

Phone Rate Appeal

THE Southwestern Bell Telephone Company filed an appeal with the state department of public utilities from an order of the Walnut Ridge city council reducing telephone rates in that city, and the department issued an order suspending the rates pending an investigation.

The telephone company's appeal petition said the ordinance reducing rates was passed without notice to the company and that the company is operating the exchange which serves Walnut Ridge and Hoxie at a loss.

Colorado

Water over the Top

THE popular song, "When the Moon Comes over the Mountain," may be changed by the Colorado citizens to the much more unusual suggestion, "When the River Comes over the Mountain," if a survey now being made for the most desirable use of Colorado river water in three of the upper basin states shows the feasibility of transmountain diversion of water.

U. S. Senator Alva B. Adams, of Colorado, said that a part of Colorado's share of the one-quarter million dollars made available from the works relief fund to study the utilization of Colorado river water will be devoted to determining how much water will be available for transmountain diversion.

Chief diversion possibilities to be studied are those from the western slope tributaries of the Colorado to the Arkansas valley. Adams believes the money would be just about adequate to supply the information wanted but deplores the fact that by the time the information is available, Federal relief funds probably will be too exhausted to take care of carrying the diversion plans into effect.

Georgia

Savannah River Project

PRESIDENT Roosevelt recently assured a Georgia congressional delegation he would shortly name a commission of three to investigate and report upon the proposed $17,500,000 Clark Hill power project located on the Savannah river some 20 miles north of Augusta. The project would generate power, assure a dependable navigation channel in the river by regulating water flow, and prevent floods which periodically harass the city of Augusta.

The Georgia Power Company, which owns considerable property at the site of the project, has agreed to sell or lease its rights to the government and to buy a part of any surplus power developed.

Illinois

One-quarter Million Electric Rate Cut

REDUCTIONS in electric rates totaling $255,000 annually to customers of the Central Illinois Light Company were ordered by the Illinois Commerce Commisson following informal conferences of the commission's attorneys with attorneys for the electric company.

The company serves electric power to De Kalb, Sycamore, and six other towns in that area; to Peoria, Peoria Heights, East Peoria, Pekin, Bartonville, and 35 smaller nearby towns, and to Springfield, a total of 49 communities.

The greatest saving will be to consumers with a commercial rating, this amounting to $95,000 annually. The savings for other groups are: Residential, $59,300; power, $62,300; combination light and power, $30,100, and miscellaneous, $7,700. The company also will assume the 3 per cent sales tax.

City Plant Election

THE Woodriver, Ill., city council passed ordinances favoring the acquisition of a publicly owned power and light plant and setting September 17th as the date on which an election will be held to determine if bonds not to exceed $375,000 shall be issued for that purpose, and if the city shall operate its own plant.

At present the Illinois Power and Light Company is operating at Woodriver and holds a franchise which has more than twelve years before expiration date. Woodriver has its own water distribution system, which has been in operation since 1930.

Indiana

Jailed Mayor Loses

SPECIAL Judge David E. Smith, sitting in Huntington county court, made permanent a temporary injunction against the extension of municipal power plant service for the city of Huntington to patrons of the Northern Indiana Power Company. The decision was a defeat for Mayor Clare W. H. Bangs, who has been attempting to make the municipal plant a competitor of the privately owned utility.

The decision automatically restrains further connection of private consumers to the city lines.

By posting bond, Mayor Bangs is now out of jail on a writ of supersedeas pending review of his case by the state supreme court. Previously Mayor Bangs had elected to stay in jail for a contempt charge for violating a temporary injunction, rather than post bond or satisfy a judgment of approximately $1,500 given the utility company for the violation of the restraining order.

Iowa

Labor Chief Questions River Channel Project

FRANK E. Wenig, state commissioner of labor, sent Iowa congressmen a protest against the proposed Federal development of the Des Moines river for transportation purposes.

Wenig said Iowa railroad men "are unalterably opposed" to the project and that "Iowa people smile out loud when you talk

of making the Des Moines river navigable."

Declaring he had received "numerous" complaints against the proposed development, Wenig said many protests "center around the proposed locks and dams for hydroelectric power purposes." The project is the one proposing to institute a system of locks and dams to make the Des Moines river navigable from Des Moines to the Mississippi.

Meanwhile at Washington, D. C., Iowa's delegation seeking a 15-million-dollar navigation program on the lower Des Moines river told Lawrence Westbrook, assistant Federal works progress administrator, the plan would take up unemployment slack in towns along the stream.

Alex Fitzhugh, executive secretary of the Greater Des Moines association, said the project might also provide work for as many as 1,000 unemployed men on relief rolls in Des Moines. At Ottumwa and other cities, he said, the benefits would be proportionately even greater than in Des Moines.

City Plant Loan

THE Public Works division at Washington announced that President Roosevelt had approved a $413,000 grant for a municipal plant at Iowa City out of the Emergency Relief Appropriation of 1935, representing 45 per cent of the cost of the proposed system. The remaining 55 per cent of the cost of the project was to be financed by a loan. The grant was made formally to the Public Works Administration which will handle all the details of drawing up the necessary contracts, supervising construction, and disbursing funds.

The Iowa City project calls for construction of a steam electric power plant, including three 300-horsepower boilers, two 3,000-kilowatt generators and a complete electric distribution system. Engineers estimated construction of the plant would require twelve months.

The works division in announcing approval of the grant by the President, said that the franchise of the utility company supplying electricity to the city expired. Incidentally, a limitation was placed on the plans of Iowa City for a municipal plant. A temporary injunction was granted by a district court barring the city from spending any part of the city consolidated fund on the proposed plant. Backers of the municipal project said, however, that tax money for the proposal was not needed and that the court's limitation was of little practical consequence.

Kansas

PWA Loan Upheld

THE United States Circuit Court of Appeals for the Tenth Circuit at Denver, Colo., on August 20th ruled that a municipality has a constitutional right to construct a municipal electric plant with funds borrowed from the Public Works Administration. The ruling was on the application of the Kansas Gas & Electric Company, of Kansas City, for an injunction to prevent the city of Independence, Kan., from building a city-owned electric power plant with Federal money.

The decision said the Federal government, by making loans and grants, does not encroach on the sovereign rights of states, and there was no unlawful delegation of authority by Congress to the President.

The court held the city has the legal right to construct an electric plant with a loan and grant from the government, but granted an injunction against issuance of revenue bonds and any unlawful diversion of water works funds for the project.

The attorneys said this apparently was a move by the court to impress upon municipalities and states the necessity of abiding by the wishes of taxpayers in any public construction.

The case was heard by Circuit Judges Orie L. Phillips and Robert Lewis, of Denver, and George T. McDermott, Topeka, Kan. Discussing the power of Congress to make the loans and grants, Judge Phillips stated as follows:

"Congress must be accorded wide discretion. There was general unemployment. Millions were dependent upon private charity and public relief for food and shelter. The situation was national. Two of the declared objects of the act were to 'rehabilitate industry' and to reduce and relieve unemployment."

Louisiana

No New Iberia Rate Cut

DECISION not to order a reduction in the rates of the Gulf Public Service Company of New Iberia which it investigated was announced by the Louisiana Public Service Commission.

The commission said that further examin-

ation of the company's charges, which the company voluntarily reduced on March 15th with a total annual cut of $24,000, failed to reveal any excess earning on the company's investment.

The Gulf Public Service Company was the first electric utility of the seven utilities investigated by the public service commission this year whose rates were not reduced, it is reported.

Michigan

City Utility Board Planned

DETROIT'S proposed municipal utilities commission, which will be created this fall if approved by the voters, is to be a powerful body of seven members, appointed by the mayor for life terms and removable only on publicly proved charges of official misconduct, according to tentative plans announced by Mayor Frank Couzens.

The proposed commission, Couzens said, would direct the operation of the DSR, the department of water supply, the department of public lighting, and the contemplated municipal gas system, if the latter should ever come into existence.

Creation of the proposed municipal utilities commission would therefore mean the automatic dissolution of the present 3-man street railway commission, the 4-man water board, and the 6-man public lighting commission.

Detroit Gas Compromise

IT appears that Mayor Couzens and the city council of Detroit, Mich., are willing to forego, for the present at least, plans for the creation of a municipally owned gas distribution system.

Last spring, by a unanimous resolution, the council committed itself to a policy of municipal ownership as an answer to the Detroit Gas Co.'s announcement of an increase in rates for manufactured gas. Since that time the company has indicated that it is anxious to get natural gas and is willing to distribute it at low rates. If the company's plans are feasible, city officials privately admit there will be no reason for the city to insist on municipal ownership.

Missouri

PWA Loan Barred

THE United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, Mo., handed down an opinion which operates to prohibit a municipality from building a municipal light plant under a contractual arrangement whereby the Public Works Administration prescribes minimum wages, hours of work, and selection of materials, it is reported.

Predicated on the theory that a municipality is not empowered by the state law to delegate such authority, the decision applies specifically to the city of Kennett, Mo., to which PWA had made a loan of $120,000 and a grant of $30,000 for electric plant construction.

The decision held that the Arkansas-Missouri Power Company is entitled to an injunction restraining the city from building a light plant under the PWA agreement. It is now mandatory for the district court to grant the injunction.

Three courses of action appeared to be open to advocates of municipal ownership who are desirous of taking advantage of 45 per cent grants and 55 per cent low-interest loans which are now available under the PWA: (1) appeal to the U. S. Supreme Court for a possible reversal of the circuit court decision; (2) appeal to Congress to permit PWA to waive wage, hour, and material regulations; (3) appeal to the Missouri general assembly to revise the law upon which the decision is based. Unless called into special session, the Missouri legislature will not convene until January, 1937.

Nebraska

County May Become Model

THE Rural Electrification Administration was reported to be considering a plan to electrify every farm in Kearney county, Nebraska, as a model lighting project. Besides the rural lighting, the program would made it possible for farmers to install pumps for irrigation to insure water for their crops during hot, dry periods.

New Jersey

Camden Project Revived

City officials of Camden have again asked Harry L. Hopkins, Federal Emergency Relief head, for PWA funds to complete a $6,000,000 light and power plant approved by the voters two years ago. The request was made as the result of the decision of the United States Circuit Court of Appeals in Denver, which held that the municipality of Independence, Kansas, may construct an electric plant with borrowed PWA money.

The Camden project had been blocked by the refusal of the state senate to join the house in passing enabling legislation to permit the city to obtain a PWA grant. Secretary of Interior Ickes had taken the position that such legislation was a necessary prerequisite to Federal aid. Proponents of the Camden plant now believe that the circuit court ruling may brighten the chances of the local project.

New York

New York City Plant Vote

The submission to the voters at the November election of Mayor La Guardia's city power plant project was virtually assured when the city board of aldermen by a vote of 48 to 1 approved a bill authorizing the referendum. Subsequent approval by the city board of estimate, as well as the signature of the mayor, were necessary before the proposal for the referendum could be legally effected, but in view of the aldermanic vote such subsequent approval was practically certain.

The almost unanimous approval given by the referendum came somewhat as a surprise in view of the fact that many of the Democratic members were known to be aligned against the measure. The overnight change in the attitude of Manhattan Democrats was due to advice received from Frank V. Kelly, Brooklyn Democratic leader, who was of the opinion that however the individual members of the board might feel about the merits of the proposal, it would be unwise for the aldermen to interpose their views for the views of the voters.

Alderman Lester Baum, who introduced the bill, even contended that aldermen opposing the city power project should vote for the referendum and then go out and urge voters to reject the plan.

The referendum bill adopted by the aldermen called for the submission to the voters of the question whether the city shall build a power plant at a cost of not more than $49,500,000 to compete with privately owned public utilities. Tentatively, the location of the proposed plant has been set for Welfare Island.

If the referendum should be adopted the legislature would then have to authorize the setting up of a local power authority to build and operate the power plant and power system. This authority, under the terms of the state law authorizing such action, would have to finance the construction by sale of bonds to the Federal Public Works Administration or to private buyers.

Lower Gas Rates Filed

Reduced schedules for the New York and Queens Gas Company and the Bronx Gas and Electric Company were filed with the public service commission in the State building, 80 Centre street. It is estimated that the new schedules will save approximately $592,470 for consumers.

Upon approval by the commission, the rates will become effective September 12th. The new schedules will make the rates for gas in the territories served by the two affiliates of the Consolidated Gas Company uniform with the rates of other territories in the system.

Albany Area Rate Cut

The public service commission announced its approval of a schedule of reduced rates filed by the New York Power and Light Corporation, designed to save consumers of electricity in the Albany district about $183,000 annually.

The new rates, effective August 17th, apply to the city of Albany, several villages and towns in Albany county, and part of the town of Princeton in Schenectady county. It was stated that no customers will have their charges increased under the revised rates.

Ohio

Tax Shield Sought

Two subsidiaries of the Columbia Gas & Electric Company serving Toledo are so apprehensive of even larger taxes under the present administration in Washington that they requested tax increase clauses in new rates to be signed soon. The Northwestern

Ohio Natural Gas Company, which supplies natural gas, and the Ohio Fuel Gas Company, selling artificial gas, have united in offering a rate which would average about 70 cents per thousand cubic feet for mixed gas of 900 BTU. This compares with an average of 62 cents now charged for natural gas and 70 cents now obtained for artificial gas.

C. W. Wallace, vice president and general manager of the two gas companies, said on offering the new mixed gas rate that any franchise signed would have to contain a provision that any additional taxation to which the companies might be subjected and which in the aggregate would exceed 1 per cent of the gross revenue in the first year of the term, would be included in a distributive increase in the gas rates for the years succeeding.

PWA Cash Waived

CITY commissioners of Sandusky voted 4 to 1 against further efforts to secure a Public Works Administration loan and grant for a proposed municipal light plant.

Pennsylvania

Seek Federal Aid in Rate Cases

THE possibility of a startling innovation in the financing of rate cases was seen in an announcement by the Pennsylvania Public Service Commission that application had been made to the Works Project Administration for a grant of $223,000 in Federal funds to help the commission undertake a formal rate case against the Pennsylvania Power & Light Company, the total cost of which was estimated at about $450,000.

Although tentatively approved by the local WPA representative and sent to Washington for further action, final disposition of the application was rendered very uncertain by the subsequent offer of the utility company to make a rate reduction of about $1,500,000. Governor Earle advised the commission to accept the reduction and continue the investigation as well. He instructed Chairman C. J. Goodnough to press the application for the WPA grant at Washington.

However, the commission seemed disposed to study the rate reduction offered with a view to opening further negotiations if a satisfactory settlement appeared likely to result. The commission had precedent for the action in its recent procedure on the Duquesne light company case, where an investigation was called off following the commission's acceptance of a voluntary reduction offer.

City to Fight Water Rate

REDUCTION in the rates of the South Pittsburgh Water Company which took effect September 1st was not enough to suit the city council of that community, which voted to enter a formal complaint against the new rate schedule before the state commission on the ground that the reduction is inadequate. The reduction offered by the company amounted to a total of about $95,000 a year, of which about $60,000 will accrue to the city and the remainder will be divided among small users who deal directly with the company in outlying districts.

South Carolina

Greenwood County Project Restrained

FEDERAL District Judge H. H. Watkins announced that he had signed an order confirming his original opinion blocking Federal aid in the proposed Buzzard's Roost power project. Judge Watkins said that in view of the great length of his first opinion the present order had been made comparatively brief and that all of the principal details were reaffirmed.

Among the minor changes, he said, was a section in which he held that the provision under which the Federal appropriation was made was an illegal delegation of legislative authority. This was inserted, he explained, in view of recent opinions handed down by the Supreme Court. Federal Judge Watkins, in his original opinion, held that Federal funds cannot, under the "general welfare" or any other clause of the Constitution, be used to finance projects of purely local benefit such as a county power plant, which would be the case in the Saluda river project.

Santee-Cooper Okehed

SEVERAL gentlemen stepped up to a desk at the state supreme court chambers, at Columbia, South Carolina, August 7th, and took turns signing a document that will probably mean the beginning of a $37,000,000 construction job in the state.

The gentlemen were the members of the

South Carolina Public Service Authority, and the document that they approved was the Authority's contract with the Public Works Administration for the construction of the Santee-Cooper power and navigation project.

As a result of this agreement, a pending decision by the state supreme court on the constitutionality of the act creating the Authority is the only hurdle before bids can be asked.

Texas

High Gas Rates Asked

THE Lone Star Gas Company was not pleased when an ordinance was proposed by the city council of Fort Worth to reduce natural gas rates 20 per cent.

A hearing was held on the matter, and city council in turn was chagrined to find that the Lone Star Gas Company, through its attorney, Roy C. Coffee, had filed a petition seeking permission to increase its rates in Fort Worth on an average of 19 per cent. With this new turn of affairs, the council decided to recess until somebody could think up a good idea about what to do next.

Gas Conservation Law Upheld

A 3-judge Federal court denied an application for a preliminary injunction to restrain enforcement of the railroad commission's antigas wastage order in the Agua Dulce field in southwest Texas.

Complainants were Clymore Production Co., the Nueces Refining Co., and S. M. Nixon receiver. The opinion stated evidence was insufficient to show the order as applied to the plaintiffs was arbitrary or confiscatory. The order was issued under the recently enacted conservation statute that became effective August 1st.

Virginia

Cities Offer Carrier Aid

THROWING their support solidly behind a movement to insure continuance of railroad service on the Washington & Old Dominion Railway, the councils of three Fairfax county incorporated towns voted to remit delinquent taxes due by the line for the years 1931 through 1934 to the municipalities, provided a proposed purchaser takes over the Bluemont Division of the line and continues to operate it.

The three incorporated towns—Falls Church, Vienna, and Herndon—adopted resolutions similar to one adopted by the Fairfax county board of supervisors at its last meeting, agreeing to remit all past due taxes, penalties and interest for the years in question if 90 per cent of the other taxing jurisdictions served by the Washington & Old Dominion Railroad will do the same, including the state of Virginia.

Commonwealth's Attorney Wilson M. Farr, who represents the receiver of the line, declared that if the municipalities concerned will agree to remit their delinquent taxes, a new purchaser has agreed to take over the line and operate it.

Wisconsin

Utility Legislation

THE Wisconsin state senate continued in its conservative attitude towards anti-utility proposals. A majority of the senate struck down a Progressive resolution calling for legislative investigation of the Wisconsin power lobby similar to the probe of national propaganda in Washington.

The objection to the proposal, already approved by the lower house, came after conservatives had slapped on an amendment widening the scope of the investigation to include lobbying activities of proponents of public ownership.

After the amendment was adopted, the senate dumped the whole business into its grave without a record vote.

Meantime, the Wisconsin assembly has voted to levy a 1 per cent to 3 per cent tax on gross income of telephone utilities to guarantee minimum wages to employees of state charitable and penal institutions.

The Wisconsin senate also rejected, 16 to 10, a bill, already approved by the assembly, which would have taxed electrical energy to finance $2,000,000 a year in old age pensions and aiding dependent children. The bill would have imposed a tax of three mills per kilowatt hour on electricity.

The Latest Utility Rulings

Higher Price Level Recognized

THE department of public works of Washington, in halting an investigation of the value of electric properties of the Puget Sound Power and Light Company but ordering lower rate schedules, said that the experience of 1934 and the first part of 1935 indicated that price levels are in fact returning to about the 1930 point and that the forecast of the United States Supreme Court in the Los Angeles Gas & Electric Corporation Case was not being justified by historical facts.

The department said it had believed with the Supreme Court that the country was facing a most serious decline in prices at the time when that court said:

> It (country) was entering upon a period of such depression as to constitute a new experience to the present generation. It was not the usual case of possible fluctuating conditions, but of a changed economic level.

Accordingly the department believed that reproduction cost "which is an important and many times controlling factor in determining fair value for the purpose of testing rates would likely be a figure which would be from 15 per cent to 20 per cent higher than would have resulted if 1932 or 1933 material and labor cost figures had been applied to the inventory."

Other changed conditions, in the opinion of the department, must also be considered. Particular mention was made of the Grand Coulee and Bonneville developments on the Columbia river which would produce an abundance of cheap electricity and would no doubt have a material effect upon electric rates through the Pacific Northwest. Also the Bone Power Bill had been adopted by the people of the state and it was thought that this would probably have an important bearing upon future regulation and operation of the company.

Concerning the cost basis for fixing rates, the department said:

> As we read the decisions of the supreme court of the state interpreting our regulatory statutes, particularly some of its pronouncements handed down during the year 1935, this department would seem to be prohibited from fixing rates which do not give controlling effect to the actual dollars and cents cost of rendering service as disclosed by valuation and accounting computations of engineers and accountants. The department is convinced that the "cost of rendering service" as thus calculated should not and does not in fact control rate levels in actual practice. Indeed, we know for certain that frequently it is economically wise and even necessary to lower rates below the point which elaborate calculations of engineers and accountants indicate should be a minimum figure, and that the lower rates frequently, if not generally, result in such increases in the use of electricity as to eventually increase revenues and profits.

Department of Public Service of Washington v. Puget Sound Power and Light Co. (No. 6734).

Legal Notice and Hearing Required to Exclude Rate Ordinance from Federal Jurisdiction

A FEDERAL district court denied a motion to dismiss a suit against a rate ordinance notwithstanding the provisions of the Johnson Act on the ground that no legal notice and hearing were provided for as part of the rate-making machinery.

The Johnson Act excludes from the jurisdiction of Federal district courts suits brought to restrain the enforce-

ment of rate-making bodies of states where the rate order (1) affects rates chargeable by a public utility, (2) the order does not interfere with interstate commerce, (3) the order was made after reasonable notice and hearing, and (4) a plain, speedy, and efficient remedy is available at law or in equity in the courts of the state.

District Judge Cox was of the opinion that notice and hearing granted to the public utility company as a matter of grace and not a matter of law did not fulfil the requirements. He said:

> In my judgment the clause in the Johnson Act "has been made after reasonable notice and hearing" means after reasonable notice and hearing guaranteed by law and not such notice and hearing as might be given by grace or caprice.

The statutes under which the rate ordinance had been adopted provided for no notice nor did they make any provision for a hearing. No power was given to the mayor and board of aldermen to summon witnesses or to compel their attendance, to compel the production of documents, nor in fact to do any of the many things necessary for a reasonable hearing. The supreme court of Mississippi in another case had held that "a notice which is not authorized by this statute or any other general provision of law could not be classed as legal notice." Judge Cox continued as follows:

> Before a person may be deprived of life, liberty, or property it must be done on the strength of something more substantial, more certain, more reliable than grace. It must be by due process of law; and due process of law cannot be measured by the whim of the municipal boards of a hundred towns and cities from Corinth to the Gulf.

Mississippi Power Co. v. City of Aberdeen et al.

Records Must Speak the Truth

THE Missouri commission in appraising property of certain electric companies ordered that certain entries and changes be made in books and records so as to conform with the views of the commission, where the method of handling certain items in the combining of properties did not meet with commission approval. The commission also said that it made no difference that these transactions were remote in time from the present.

It appeared that certain securities issued to pay for the acquisition of property had been returned by the seller to the company. The commission held that the amount of such securities should be credited to the plant and investment account where they were originally charged. A capital surplus account to which the items had been credited, in the opinion of the commission, should be eliminated.

The opinion was expressed that the books and records of the public utility should be corrected so as to "speak the truth" concerning a dividend on common stock shown on the books and apparently declared in violation of law out of the proceeds of the sale of common stock returned to the company. A parent company had asserted that this was not a dividend but was to represent the difference between the sale price and the par value of preferred stock and that in order to comply with the requirements of bankers underwriting the sale of the issues, the books of the company were required to show that the preferred stock was sold at par when in fact it was actually sold at a discount. The commission said:

> If it was a dividend, it was declared out of the proceeds of the sale of the stock in violation of the orders of the Kansas commission and in violation of the general law respecting the declaration of dividends by corporations. If it was not a dividend, the books of the company are untrue and false and the records of the corporation, which show a formal resolution by the board of directors of the Empire Company, are also untrue. Moreover, if the transaction was intended to reflect a discount it was improperly charged to capital surplus in direct violation of the accounting rules pro-

mulgated by this commission which require that all premiums and discounts be carried on the balance sheet until absorbed by the earnings of the company. We are of the opinion that this whole transaction, either on the basis of the actual books and records of the company, or upon the basis of the representations of Henry L. Doherty & Company, is blameworthy. . . .

Public Service Commission of Missouri v. Empire District Electric Co. et al. (Case No. 5550).

Law Assessing Regulatory Costs against Utility Is Invalid

THE Washington Supreme Court held unconstitutional the state law imposing the cost of public utility investigations by the public service department upon the utilities. The court reversed by a six-to-two decision a ruling by the Thurston Superior Court in suits brought by the department against several utility companies to collect costs.

The court reasoned that the law placed unequal burdens on utilities similarly situated. It was pointed out that the department failed to charge investigation costs against some utilities, while forcing others to pay. The court declared:

It is possible for one investigation to follow another without any limit until the particular utility is destroyed. We see no reasonable protection from persecution. The law destroys and denies the American idea of fair play which underlies our system of government . . . the department is left practically uncontrolled and may charge all or only such part as it may consider necessary and reasonable. In this respect, the statute by its very terms, is an invitation for the department to indulge in discrimination and favoritism and in fact, though actuated by best intentions, the department has discriminated, and in many cases made no attempt to collect any part of the costs of investigation.

Department of Public Service v. Puget Sound Power & Light Co. et al.

Small Company Not Required to Make Disproportionate Investment for Expansion

AN order of the Pennsylvania commission requiring a small water company with a capital stock of $10,000 and a mortgage indebtedness of $12,000 to expend $50,000 in enlarging its mains and constructing new mains for 3½ miles so as to furnish water to other villages was declared "manifestly unreasonable" by the Pennsylvania Superior Court.

The court disagreed with the commission as to the prospective revenues, held that the company was not required to furnish service in the entire township, and stated that commissions as well as courts must take notice of economic conditions affecting the ability of a public service company to carry out the orders of the commission. The court, in annulling the determination of the state commission, said:

The order of the commission is, of itself, no Aladdin's lamp, a rub of which will supply such disproportionately extensive demands for capital; while the failure to obey the order would subject the company to unnecessary and unjust fines and penalties (Public Service Company Act, Art. VI. §§ 33, 34, 35, 36) which might well bankrupt it and seriously affect its ability to supply the communities it is already serving. It is, of course, desirable, as far as reasonably possible, to supply water to such villages, or parts of them, as are not now in the enjoyment of a central water supply, but the fulfilment of such a laudable end must be within reasonable and practicable limits, and a desire to help these villages must not be so pursued as to bankrupt the water company or injure other villages, more conveniently located for the supply of water; nor can the impossible be ordered, in the light of present-day conditions and circumstances.

Morris Water Co. v. Public Service Commission of Pennsylvania.

College Deemed a Water Corporation

A COLLEGE incorporated as a charitable institution for the purpose of education but furnishing surplus water from its system to the inhabitants of a village was held by the Missouri commission to be a "water corporation" and a public utility within the meaning of the Missouri statutes to the extent that it was engaged in furnishing service to the public. The commission said:

> Whether any individual or corporation is a "water corporation" and all or part of its system of water distribution a public utility depends upon what is actually done, and does not depend upon charter authority or franchise rights. If a corporation owning a water system dedicates a portion of the system to public use, and assumes services general, in character its water system is to that extent a public utility and the company a water corporation within the meaning of the law. The functions performed by the corporation and the character of the use made of its property are the determining factors.

Mayor and City Council of Parkville v. Park College (*Case No. 8831*).

Land Company Operating Resort Not a Public Utility

A LAND company owning the fee to all land within the limits of a summer resort and furnishing electricity only to stockholders was held by the Michigan commission not to be a public utility. The commission held that it had no jurisdiction over the rates of the company.

The Michigan statute confers jurisdiction upon the commission to fix rates for electricity transmitted through the public highways, streets, and places of the state. No highways, streets, or places located within the property of the land company had been dedicated to the public. Streets were used solely by permission of the company as private rights of way.

The commission distinguished its decision from a former decision in Antisdel *v.* Macatawa Resort Co. (Mich.) P.U.R.1925E, 614, holding that in the earlier case the land upon which the houses and cottages were built was deeded to the owners and privately owned. There was no limit upon ownership of cottages and lots and no restriction upon leasing or selling the same as there was in the case under consideration. Moreover, the company in the earlier case offered to furnish and did furnish not only electricity but also water to the public generally located within the limited area of the resort association. *Re Pointe Aux Barques Land Co.* (*D–2929*).

Severance Damages Denied on Municipal Acquisition of Local Plant

THE supreme court of Wisconsin upheld an order of the state commission which fixed compensation to be paid by a village for acquisition of the local plant of an interconnected electric system without making allowance for severance damages.

The company argued that if municipalities which it served as local utilities progressively took over distribution systems, the company would eventually be deprived of all of its property except its main steam power plant and its hydroelectric plant, that with its distribution systems all gone these plants would be left on its hands with nothing to serve, would be rendered valueless, and the company would thus be de-

prived of its property without just compensation and without due process of law. The company argued further that to avoid this result each municipality should pay such proportionate part of the total value of its several power plants and transmission lines that would thus be rendered valueless.

The village contended that the statute expressly provided that the company should be compensated for the property taken and that such loss, if any, as it might suffer in the future through further acquisition of local utilities would be a mere loss of business the risk of which the company took when it purchased the local utility property. It was further argued that had the village taken over the property of the original grantee of the indeterminate permit it would have been required to pay only the value of the property taken and that the company could not add to the amount it must pay by tying the local distribution system up to its unified power and transmission system.

The court, in sustaining the contentions of the village, declared that whether a village must bear the additional burden of a proportionate part of the diminution in value of the total property involved in bringing current from distant and widely separated sources of power is a question of public policy that should be declared by the legislature, but that under the existing statutes the commission is required to treat the local entity as the unit and to award compensation upon the basis of the value as a going concern of the property that is "actually used and useful for convenience of public."

The court also held that the company was not prejudiced by the refusal of the commission to make an absolute allowance and direct immediate payment of removal costs, where the commission provided in effect that if the village should not take current from the company to supply its distributing system, the commission would then determine and award to the company the cost of removing facilities for transforming the high-tension current and transmitting it to the street lighting line of the village.

Disallowance by the commission of a proportional part of the overhead and maintenance cost of the district of which in the company's set-up the village was a part was also upheld.

The court held that the commission, moreover, had power to provide for the joint use of poles carrying the company's high-tension transmission line under statute governing joint use of poles and equipment by public utility companies. *Wisconsin Power & Light Co. v. Public Service Commission, 261 N. W. 711.*

Municipality Cannot Acquire Waterworks beyond Municipal Limits

AUTHORITY granted by statute to cities to extend water pipes and to furnish water beyond municipal limits, but not authorizing such extensions where the territory is being supplied with water by a private company, does not permit a city to acquire the property of a private company beyond municipal limits, even under a contract voluntarily entered into between the city and the water company, according to a ruling by the Pennsylvania commission.

The commission, referring to the statutory provision that a city was not authorized to extend water pipes into territory "supplied with water by a private company," said:

> At first glance, it may seem reasonable to assume that the primary purpose of this provision is to protect private companies from competition, and that when the private company involved does not oppose the extension, but actually desires it, the provision may be considered waived. However, various other interests are protected and other purposes are served by this prohibition.

The legislature may have intended to permit the extension of city water service to residents of territory adjacent to a city where no private source of supply was available, but to prevent unnecessary extensions at the expense of the city taxpayers. The purpose of the prohibition may have been to prevent the risk of municipal funds and the taxpayers' money where no public necessity for the service existed. But it is not for us to speculate upon the possible intent of the legislature.

Re Manheim Township Water Co. et al. (*Municipal Contract Docket Nos. 6512, 6513*).

Transfer of Appropriations Not Allowed

THE supreme court of Ohio held that where certain items were disapproved by the governor in his veto of an appropriation bill, a board could not transfer moneys for such items.

The general assembly had made appropriations for the public utilities commission. Certain items were vetoed by the governor. A section of the appropriation act created a controlling board and authorized it to grant authority to any department, institution, office, or other agency or body for which an appropriation was made to expend the moneys appropriated otherwise than in accordance with the items set forth, and for such purpose to authorize transfers of funds within a department, division or agency for which appropriations were made.

The court declared that under the clear and specific provisions of the Constitution, the items disapproved by the governor became void unless repassed in the manner prescribed by the state Constitution. That had not been done. The provisions of the act authorizing the controlling board to make transfers of funds, it was held, could have no application in this case for the reason that such items were provided by the legislature but were vetoed by the governor. If the transfers requested were made, that would be tantamount to the enactment of an appropriation by the controlling board, and if the act were so construed as to authorize such a transfer, it would be unconstitutional, for it would override the governor's constitutional right of veto by a board which was created by the legislature. *State ex rel. Public Utilities Commission v. Controlling Board of Ohio et al.* (*197 N. E. 129*).

Other Important Rulings

THE Wisconsin commission approved the extension of telephone service to a garage in the twilight zone between two companies where it appeared necessary to have service from both directions. The commission said that it did not consider that the setting up of an artificial barrier to divide territories of any two telephone companies should serve to preclude the rendering of adequate telephone service. *Re Wisconsin Telephone Co.* (*2–T–166*).

The Wisconsin commission held that a telephone company should discontinue furnishing service to summer hotels over its regular rural lines and should provide this type of subscriber with one or two-party service. It was said that the presence of summer hotel subscribers upon rural lines resulted in inadequate service to regular rural subscribers attached to the same telephone lines. *Re Nasewaupee Telephone Co.* (*2–U–878*).

NOTE.—The cases above referred to, where decided by courts or regulatory commissions, will be published in full or abstracted in *Public Utilities Reports.*

Appendix

Important addresses on questions of public interest delivered at the annual convention of the Section of Public Utility Law of the American Bar Association at Los Angeles, July 15 and 16, 1935.

Attack on Utilities and Regulation

By LEON O. WHITSELL*

At no time during the 159 years of our nation's onward march has your profession been burdened with such grave and portentous responsibilities. You are essentially students of American History, American Government, and American Law, organic and statutory. Your acquaintances, your friends, your clientele, and your fellow-citizens look to you for solution of serious controversies, and leadership in defense of our Constitution and our flag.

At no time in our history have the theory and structure of our government met with more salient attack. Every phase of the law is on trial. In this direction we see our Federal and state Constitutions under relentless fire. In another direction, criminal procedure and practice are undergoing far-reaching change and exploitation. From a third source, manifold civil and equitable precepts are in the throes of metamorphosis. Finally, and most significantly, the entire American concept of public utility operation, control, and regulation are on trial before the sovereign power of the citizenry and electorate.

It is propitious that the utility lawyers of America should convene in California at this critical hour in their effort to comprehend and solve the gravity and vastness of the problems of utility structures and their regulation. This state is justly proud of her record in these fields of endeavor and achievement. Since its epochal creation by Governor Hiram Johnson in 1911, the California Railroad Commission has marched forward progressively over the ever-broadening arterials which intersect and bound public utility regulation.

I desire to take issue with that growing political philosophy which is being broadcast from high places that the regulation of public utilities, by state commissions, has proven a failure and that some other method or system should be adopted in lieu thereof.

Regulation in California under the Public Utilities Act, has been a success. It has fully justified the faith of those who framed it and brought it into being. The people of the state have full confidence in the act and in their railroad commission. This is abundantly evidenced by the fact that at every session of the legislature since 1912 they have enlarged the act and have thereby clothed the commission with additional powers and jurisdiction until today California stands at the forefront among the states having a regulatory act which covers practically every phase of public utility regulation.

Under the administrative policies of the California commission the people have continued to enjoy adequate service at reasonable rates—and industries have grown up and experienced an unprecedented measure of prosperity.

*From the address of welcome of the president of the California Railroad Commission.

Rural electrification has kept pace with the progress of the state and the farm load has shown a gradually ascending curve. The domestic use of electric power has continued to increase and it has become the first essential of the home.

THE utilities have likewise grown and prospered under regulation. They have been allowed to earn a fair return upon the fair value of the property used and useful in the public service. They have been able, under regulation, to obtain money at reasonably low rates and to adequately finance their undertakings and at all times meet the demands for expansion, thereby keeping step with the ever-accentuating development and progress of the state. I repeat that regulation under the Public Utilities Act has been and will continue to be preëminently successful in California.

Some Ideals for the Section of Public Utility Law

By HARRY J. DUNBAUGH*

THE purpose of the Section of Public Utility Law, as expressed in its by-laws, is as follows:

> In addition to furtherance of the chartered purposes of the American Bar Association, the purpose of the Section of Public Utility Law shall be to bring together for better acquaintance and mutual advantage those members of the bar who are interested in the law governing the public services as from time to time developed and defined; to hold meetings, conduct discussions, make studies, surveys, and analyses, as to the law of public utilities under private or public operation; and to formulate and submit, to the Section and the association, such reports and recommendations as may be deemed useful to the profession and advisable in the public interest.
>
> An especial purpose of the Section is declared to be to further the public interest as the prime factor in the development of the law of public utilities, and to provide a common meeting-ground and impartial forum for those members of the Bar who are engaged in dealing with problems of utility law in any capacity, whether as members of or attorneys for public regulatory bodies, or as attorneys for corporations or investors in this field, or otherwise.

From time to time it is well to take our bearings, as it were, and to ascertain whether or not we have kept to our charted course, to note our progress, and to inspect the seaworthiness of our craft.

THE Section is not, and should not be, *pro*-utility or *anti*-utility. Some criticism has been directed against the American Bar Association, as a whole, on the alleged ground that it tends to list toward the side of the so-called vested interests, rather than the side of the public interest. If this means that the association stands for the upholding of constitutional rights against unconstitutional infringement or confiscation, the criticism is not well founded. If it means that the association fails to steer a true course where the rights of the few are balanced against the rights of the many, in matters of public welfare, then there might be justification for the censure.

Public utility law is concerned with matters involving tremendous investment in railroad and other utility properties, with the daily necessities, conveniences, and comforts of nearly every member of the public, and with the balancing of the obligations of public service over against the rights of private property and management. The Section of Public Utility Law, constituted of lawyers whose every-day practice immerses them in one side or the other of the difficult problems growing out of all these matters, is in a position where a careful charting of its course is of the utmost importance.

*From the address of the chairman of the Section of Public Utility Law, July 15, 1935.

The question is, can those of us who are in the turmoil of action and storm lay aside prejudice of partisanship, maintain a clear view, and mark the progress of the law, past, present, and prospective, with impartial minds? To do this, will fulfil the logical purpose of the Section, and will lift it above the sort of criticism that has been referred to.

As one member of the Section, it is my firm conviction that the challenge can be, and for the most part has been, squarely and successfully met.

Legal Aspects of Government Competition

By FORNEY JOHNSTON*

I must acknowledge at the outset that I fully concur with the limitations suggested by the chairman with reference to the functions of the Section and believe that reasonable conformity with the same limitations should be observed by those who may address the Section with reference to subjects that are more or less controversial in character.

I trust, in stepping out from the firing line and in undertaking the effort to occupy a more or less detached view, that if I evidence any characteristics of partisanship that it will be interpreted as partisan for the Constitution and not for any client or issue that may be involved.

This title would be academic if under the doctrine of Massachusetts *v.* Mellon and Frothingham *v.* Mellon [1] neither the states nor citizens could assert a justiciable controversy to restrain the government from *ultra vires* conduct of proprietary business. If it be assumed that the business [2] is in excess of Federal function and in violation of the Ninth and Tenth Amendments and threatens or results in proximate special injury to the state or to the citizen, the right to enjoin agents from giving effect to the unconstitutional procedure is, in general, justiciable under the general principle of Texas & N. O. R. Co. *v.* Brotherhood of R. & S. S. Clerks (1930) 281 U. S. 548, 569, and Frost *v.* Oklahoma Corp. Commission, 278 U. S. 515, P.U.R.1929B, 634.

Nor would there be much usefulness in an attempt to plot a course from the decisions if a recital of purpose by Congress were controlling on the court as to the dominant objective of a statute, or if congressional determination of means to an end were under all circumstances final or, indeed, if the attitude of the Supreme Court were as subordinated to the duress of public clamor and congressional response as during the unhappy days of the 60's. Legislative, executive, and military action was taken, including military refusal to obey the writ of habeas corpus issued in the Merryman Case, which, in general, Lincoln defended against the charge of being subversive precedents by asserting that they were emetics and not habit forming. There were Black Fridays in those days for the court and the Constitution as well as for the market.

The acquiescence by the court, in the McArdle Case, in the limitation upon its jurisdiction, lead Benjamin R. Curtis to assert that Congress had subdued the court. This, followed by the history of the Legal Tender Cases and the Veazie *v.* Fenno (more dangerous from the reasoning than the result) would have left a geologic fault of such magnitude striking across the principle of the decisions as to impair confidence in tracing any principle to a reasonable, assured future result were it not for the decisions in Ex parte Milligan and in the Civil Rights Cases, followed by the decisions in the Cummings and Garland Cases, supplemented in recent years by the Child Labor

* Member of the Alabama bar and vice president of the American Bar Association.

Tax Case and by the decisions of May 27, 1935, epochal not for the novelty of the principles expounded, but for their dignity and timeliness and for their complete repudiation of academic theories as to the atrophy of judicial function.

What Lincoln admitted to be an emergency emetic and Justice Field maintained had become the daily bread of the Constitution,[3] must, as we now face the future, yield to the test of basic power at the outset, before consideration is given to the question whether the means proposed by Congress are rationally related to a constitutional end. The declaration by the court, in the face of the depression and of recitals by Congress of purposes and conditions intended to forestall judicial review, that "extraordinary conditions do not create or enlarge constitutional power," [4] asserted notwithstanding contrary academic assurances referred to below, leave without impairment the indispensable element of a Constitution. That element is, of course, the principle that so long as not changed affirmatively, the meaning of the Constitution does not change. Means to make its changeless powers effective may expand or contract within the doctrine of relationship in accordance with the conditions to which the powers are sought to be applied, but to contend that the meaning of the Constitution changes is to relegate it to the function of a legislative power.

ON the theory that we have a Constitution and that the courts will enforce its traditional exposition, as the supreme law of the land in all controversies before it in which a decision is judicially required, this discussion will consider the constitutional limitations upon the power of the Federal government to engage in proprietary business in state domain.

The instinctive reaction to the suggestion of the Federal government in business in state domain is that a constitutional paradox has been mooted, requiring no refutation beyond its statement. Analysis of the actual facts is desirable in order to determine the extent of the phenomenon and the extent to which it is threatening, and from what quarter.

Scant reflection is necessary for the conclusion that however ominous past adjudication may have appeared until held to the boundary line by succeeding decisions, none of them has the potential certainty of shattering the dual system or so hopelessly committing the American government to an expanding centralization of function, expense, and power, and to nation-wide and spasmodic experiment by mass action of Congress, as would follow if the court should sustain the right of the government to engage generally in commercial functions under the guise of the war power, or of disposing of property or investment or regulating commerce.

THE court and the Constitution survived the forebodings of Marshall upon the election of Jackson;[5] of Story and Webster upon the appointment of Taney;[6] of Kent in the "Constitutional guardianship and protection of the Supreme Court" (Ibid p. 303); of Benjamin R. Curtis on the occasion of the McArdle Case; of Charles Francis Adams following the decision in Juillard *v.* Greenman; of Justice White in his dissent in the South Carolina Dispensary Case, and of Justice Field in his dissenting opinions in the reconstruction cases, to select a few out of many instances; but it is difficult to see how the principle of the Tenth Amendment, which, after all, is the Constitution so far as organic structure is concerned, could survive approval of the theory of Federal power asserted by those advocating for the government the functions discussed in this memorandum. If Congress could confidently exert them, it is difficult to see how there could be any effective retreat within a budget consistent with the private ownership of property or the survival of the state governments as the laboratories for political

experiment and as the sole means of economic administration of local affairs and freedom from remotely controlled and inevitably arbitrary action by government.

This discussion will be limited principally to direct action by the government or its legal equivalent; that is, action by the government for its own account either directly or through corporations or other agencies acting as agents of or for the account of or at the risk of the government.

WHAT, then, are the facts as to existing and potential competition by the government?

The impression prevailed generally even prior to March 4, 1933, that the Federal government was unduly extending its activities into the field of production and commercial operation. The Shannon Committee Report [7] tabulates a formidable schedule. The activities listed relate for the most part to the service of government requirements or within Federal property. These functions, with exceptions, some of which are noted in the margin,[8] were not competitive in the open market or were in general so clearly related to government use and consumption and therefore within the scope of Federal power, if not within the territorial and legislative jurisdiction of the government, as to present no important question of constitutional power, although presenting a question of political and economic policy of the first importance.

Up to the time of the present administration, provision of the instrumentalities of interstate commerce by land and water, justified as instrumentalities under a combination of powers, with undecided characteristics discussed below, along with the postal system and fiscal or treasury agencies, had been the principal occasion for government contacts in the commercial field either directly or through corporate agencies privately owned and operating for profit. Reclamation projects confined to the public domain are of course referable to the territorial jurisdiction of the Federal government, are germane to the preparation of the lands for settlement and sale, and furnish no distinct legal precedent.

IN the same general class and approaching the border line was the Boulder Canyon Project Act, in which the government is improving navigation and, under the immunity from judicial restraint as to expenditures established by Massachusetts *v.* Mellon (1923) 262 U. S. 447, is acting as banker to the group of states which entered into the Colorado River Compact, pursuant to which the government constructed the dam and entered into leases of the emplacements. The government is not there manufacturing and marketing power.[9] Disposition by lease of government-owned dams or other property [10] is an accepted method of disposing of government property within the meaning of the property clause of the Constitution, subject to qualifications not necessary to be elaborated. While cited as an authority and as a precedent for the extraordinary commercial undertaking within state domain of the Tennessee Valley Authority, announced as a prototype of a series intended to pattern the nation, the Boulder Dam Project cannot properly be relied upon for that purpose.

In adopting privately owned agencies operating for profit as agencies to perform functions of the Federal government, first sustained in McCulloch *v.* Maryland (1819) 4 Wheat, 316, 406, there was an instinctive tendency on part of Congress to permit even governmental functions to be discharged, wherever practicable, in the stream of normal business. The functions of the treasury were not established as a completely organized departmental operation distinct from the banks until the Act of July 4, 1840, during Van Buren's administration.

THE national banks themselves, created by the government as fiscal agencies, have functioned in all substantial respects as competitive private

corporations for profit, and have presented no substantial disturbance through government competition.

The distinction between competition by the government in the general market, either directly or through a government-owned corporation, and competition by a privately owned corporation operating for profit, although created or adopted by the government as an agency to perform certain definite Federal functions, is fundamental both from a constitutional and an economic standpoint. A commercial function with competitive attributes may well have a constitutional relationship to a private corporation used as a Federal agency which the same characteristics would not have in the case of the government itself or a government-owned corporation.

This is well illustrated by the bank cases. The success and survival as fiscal agencies of the treasury of the national banks, operating as privately owned and operated banking institutions, is said to be dependent upon their ability to compete fairly with like institutions organized under state laws. On this conclusion the court justified what is perhaps the most unique of all applications by Congress of the "necessary and proper clause" of the Constitution, namely, that where state laws unite the function of administering trusts and estates with the banking function of state banks, the extension of those same functions to national banks is appropriate and within the power of Congress in order to enable them to survive against competition.[11] Clearly, no such power could have been claimed either for the government or for a wholly owned government corporation, since profits from commercial competition have no relation to the survival of the government or to the administration of the treasury.

THE decisions in the bank cases were arrived at against powerful dissent and plainly go to the constitutional limit. It may be doubted if Chief Justice Marshall had any such faintly related function in mind in McCulloch v. Maryland (1819) 4 Wheat. 316, since in Osborn *v.* Bank of United States (1824) 9 Wheat, 738, 860, he asserted that if the bank could "be as competent to the purposes of government without, as with this faculty (of lending and dealing in money), there would be much difficulty in sustaining that essential part of its charter." He concluded that the bank must have the power to deal in money in order to survive as a bank at all. It is difficult to see how a bank could function as a bank at all without the money power. The relationship was "plainly adapted" to the Federal objective. The court has now asserted that all powers may be granted to the national bank necessary to protect the competitive status of the national agency as a bank from the effect of restrictive or discriminatory legislation by the state. This by no means suggests that there has been any abandonment of the test of functional relationship.

IT has been made plain from the outset that the test of relationship as to the means and instrumentalities deemed necessary and proper to give vitality and efficiency to the national government must also be judicially applied as a limitation upon Federal power in order to maintain the integrity of our dual system. In perpetuating the test formulated by Hamilton:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution are constitutional,

Chief Justice Marshall in McCulloch *v.* Maryland (1819) 4 Wheat. 316, 423, asserted the indispensable corollary:

> . . . should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such decision come before it, to say that such an act was not the law of the land.

That assertion of judicial duty so ad-

mirably sustained by the court relates not merely to the judicial determination of the rational relationship of means and instrumentalities to further an admitted Federal objective but to the determination, under different and less mechanical principles, of the question whether the objective is within the organic powers of Congress. As stated above, this determination of primary power must precede consideration of means.

THE assertion in Linder *v.* United States (1925) 268 U. S. 5, 17, rendered more than a century after McCulloch *v.* Maryland, *supra,* left no doubt of the judicial scrutiny by the courts both of the end and the means intended and adopted by Congress:

> Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not intrusted to the Federal government. And we accept as established doctrine that any provision of an Act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power, but solely to the achievement of something plainly within power reserved to the states, is invalid, and cannot be enforced.

Thus it is that the judicial presumption of constitutional objective (McCray *v.* United States [1904] 195 U. S. 27; United States *v.* Doremus [1919] 249 U. S. 86); gives way when the object is within or the means employed are palpably intended to reach an objective within the exclusive range of state power. Bailey *v.* Drexel Furniture Co. (1922) 259 U. S. 20; Hammer *v.* Dagenhart (1918) 247 U. S. 251; Hill v. Wallace (1922) 259 U. S. 44, 66 L. ed. 822; Trusler v. Crooks (1926) 269 U. S. 475, 70 L. ed. 365; Magnano Co. v. Hamilton (1934) 292 U. S. 40, 78 L. ed. 1109; Pollock Case (1895) 157 U. S. 429, 39 L. ed. 759; Nigro v. United States (1928) 276 U. S. 332, 72 L. ed. 600; or where the facts, recitals, or theory of the legislation does not meet the test of judicial analysis. Chastleton Corp. v. Sinclair (1924) 264 U. S. 543, 68 L. ed. 841.

The traditional reluctance of the court to interpose an adjudication of invalidity, whether as to means or as to objective, has been accompanied by evidence of a high sense of primary responsibility on the part of Congress and even greater unwillingness on part of the Executive to throw upon the people the burden of resistance and upon the courts the burden of judicial annulment of doubtful legislation. There was a marked and grave exception to this rule following the Civil War when Congress undertook by a series of aggressive acts to extend Federal regulation beyond the scope of the Civil War amendments and met the restraint of the court. United States *v.* Reese (1876) 92 U. S. 214; Civil Rights Cases (1883) 109 U. S. 3.

ON like principle, the doctrine that § 1 of Art. I of the Constitution vests all legislative powers in the Congress as a continuing and nondelegable trust was continuously recognized by the court but rarely (Knickerbocker Ice Co. *v.* Stewart [1920] 253 U. S. 149) applied, until necessity forced its recent application in the Panama Oil and Schechter Cases, due to the restraint by Congress over a period of nearly a hundred and fifty years in delegating administrative functions that stopped short of legislative delegation.

No analysis of the situation in relation to the subject matter of this discussion could be undertaken without emphasis upon the sharp departure by Congress from this traditional attitude for the first time since the Civil War, and reference to at least one of its responsible causes which comes home to the Bar.

The desire for change and emergency pressure would not alone have brought about so grave a reversal of the policy of respect for constitutional limitations, had not there become more or less current a conception that the Constitution was, after all, a monument and not a mandate; in short, that the Constitution was itself defective because of organic uncertainty, and therefore negligible.

A LARGE group of academic critics of the Supreme Court has, for almost a generation, supported the idea that there is in fact no practical test of constitutionality, that the decision in general is a matter of social outlook, of economics or politics. The extent of this tendency may be seen in Professor E. C. Corwin's recent volume (The Twilight of the Supreme Court—1934) in which he asserted that the Supreme Court had under the decisions complete freedom of choice whether to sustain or overturn the New Deal (p. 182). After the unanimous decisions in the Schechter Case, this learned and always interesting writer expressed the opinion that the Constitution looked even more intently to the President than to the court, a somewhat Pickwickian conception! Professor Thos. R. Powell in his recent Essays on the Law and Practice of Governmental Administration (1935) (p. 199) even more vigorously asserts that the formulæ found in the decisions "are broad enough to be invoked in approval of every administrative determination that a transaction is one affecting interstate commerce. . . . The Supreme Court can go as far as it likes in allowing Congress and the administration to go as far as they like."

This constant impregnation by dialecticians has had its effect upon public opinion, upon the administration, upon those drafting startling departures in legislation and upon Congress. Recitals in the preamble to statutes, both of objectives or relationships, having no remote relation to a Federal end were intended and expected to forestall traditional application of the Constitution, "wearing, in Sainte Beuve's phrase, 'the smug face of facility.' " [11a] The manifest transgressions of reconstruction days have been transcended so radically as to make it certain that the theory of Congress and the administration is that the Constitution is an attitude and not an intelligible standard.

There is, to be sure, a distinction between the existence of power and the arbitrary exercise of power, but so far as the line of Federal function is concerned it is more easy to determine than the question of confiscation or due process and yet the Fifth and Fourteenth Amendments stand as workable and predictable landmarks.

FOR centuries the courts have applied the test of reasonableness to a variety of social obligations. The entire function of public service is founded upon its judicial application. The anti-trust acts are based upon it. The greatest contribution of American policy since the Constitution is the system of administrative law based on judicial review of arbitrary action. The police power of the states is a function of relationship. And yet, when we come to the Constitution, these tests of reasonable relation and arbitrary action and effect are said to be meaningless and mere matters of social digestion or a matter of hormones, not of the Federal Constitution but of the justices. A constitutional system could not permanently survive that conviction.

Its political implications and bearing upon the court and its inarticulate threat of selection of personnel because of social or political opinions are too grave to bear contemplation.

While lacking in any mathematical exactitude—and what social organization, what human relation outside of a penitentiary, is scientifically exact in its stifling equality—the judicial determination of reasonable relationship, of organic purpose and of arbitrary action underlying the administration of constitutional government in America remains, with the formulation of the Constitution itself, the greatest contribution of the human race to social order and human freedom.

NO greater disservice can be done to the American constitutional system than to challenge the rational adequacy of judicial test, as many of these writers and teachers have done. The unanimous conclusion in the Schechter Case should have put an end to administrative and congressional

misconceptions. It announced nothing new. It announced nothing startling to a single member of the Bar having an informed respect for the Constitution. It was a shock to those who conceive that the Constitution is a social attitude and that the justices had better look to their attitude.

So, in the matter of means and instrumentalities adopted by the government and their rational relation to an alleged Federal objective, it will be assumed here that no such insoluble and anarchic situation exists as the academic writers have supposed, that civil order under our dual system requires today as it did during the administration of Andrew Jackson, a judicial determination of the boundary line, and that the court will continue to define the border between the legislative discretion and arbitrary action and between reserved and delegated functions by those standards, effective to the end, which have been applied for a century and a half.[12]

THIS uniform forbearance by the Federal government in asserting commercial functions, reflected even in the matter of supplying its own requirements for commodities, with certain clearly defined and traditional exceptions, persisted for generations. It survived the high pressure of the Civil War. It continued without change of policy through the Federal Reserve system, the twelve banks being owned by commercial banks and operating for profit. The nation met its responsibility in the World War with the formation of some six government-owned corporations.[13] These agencies began in good faith the effort to liquidate as soon as their war purposes were terminated. The result was not only keeping faith with the Constitution, but a consistent restraint of Federal function and expense resulting in curtailment of the public debt.

The War Department, warned by experience, has long since adopted the policy of looking to the organization of industry for its war supplies, thus relieving the military establishment of the grave economic problem of abnormal liquidation and industrial confusion which on termination of the war would follow extensive assumption of industrial function by the government, as well as of the perennial temptation to utilize the plants for some form of national collectivist production so unhappily illustrated by the nitrate and steam electric and hydroelectric plants at Muscle Shoals.

THE little discussed provision of the Constitution (Art. I, 8–12) prohibiting appropriations for the support of armies for a longer term than two years stands as a declaration of policy if not a more effective prohibition against commitment of the government to the establishment of a permanent mechanism intended to operate as a war plant during time of war, with the idea that it may be devoted by the government itself to permanent commercial production in competition with citizens during time of peace. This possibility was in the background of a provision in § 124 of the National Defense Act of 1916 (39 Stat. 166, 215) under which, long after the cessation of war, the nitrate plants were completed at Muscle Shoals, followed by the Muscle Shoals Acts of 1928 and 1930, vetoed by Presidents Coolidge and Hoover. These acts would have committed the government to direct operation of a permanent commercial fertilizer business to the extent of the maximum capacity of the plants. The obsolescence of the plants for nitrate production, already known generally in 1928 and 1930, and now universally conceded, lends significance to the constitutional provision quoted.

The diversion of the steam electric and hydroelectric units in these plants to a permanent electric network by the Tennessee Valley Authority, with delegation of discretionary power to establish the business of manufacture or sale, or to give away nitrates, thus receding as to nitrate from the mandate of the earlier acts, and leaving a determination of policy to TVA, represents

the current phase of the government's commercial operations in that area, held illegal as to the electric network in Ashwander *v.* Tennessee Valley Authority,[14] now pending on appeal in the circuit court of appeals for the fifth circuit, submitted June 17, 1935.[14a]

THE efforts of Senator Windom, which persisted over a long term of years, to bring about the construction and operation by the government of competitive railroads between the Mississippi and the Atlantic seaboard, for the purpose of regulating the carriers by public competition, were repudiated in favor of the American and the constitutional principle of regulation. The Cullum Report preceding the adoption of the Interstate Commerce Act, asserted that regulation through public ownership has been practically unknown in the United States; that it was of foreign origin, and foreign to the character of our institutions. It asserted that the time may come when the people of the United States would be forced to consider that course, but that because of the dangers to be apprehended "from the giving of such additional power to the government" the committee did not consider that procedure desirable "until other methods of regulation more in the American spirit have at least been given a trial and have proven unsatisfactory."

Even in the case of shipping (which falls in the exceptional class of instrumentalities of interstate and foreign commerce) a consistent effort has been made by the government to find some method for transferring the vessels outright or by charter to private operators.

The railroads, taken over temporarily under power of eminent domain for war purposes, were relinquished at the earliest opportunity.

So much for the Federal aggression in the commercial field until the close of the World War.

FOLLOWING the war only two government corporations were authorized by Congress until the Hoover administration.[15] During the Hoover administration the Reconstruction Finance Corporation and Home Owners Loan Corporation were organized as depression measures. And then the deluge! A partial list is set out in the margin.[16] Many corporations were organized pursuant to executive order under the forms of state law. Their aggregate net investment, making deduction for intercorporate credits, is not readily ascertainable. It was substantially in excess of four billions as of April 30, 1935. The Reconstruction Finance Corporation held potential and in part actual operating control of not less than two thousand utility plants and their businesses, insurance companies, trust companies, banks—state and national—a large proportion of the railway mileage of the United States, real estate mortgage companies, and not less than four million bales of cotton. The assertion is made that the administration's present (July, 1935) control, direct or indirect, of previous cotton crops (through the obligation to repurchase at 12 cents through Commodity Credit Corporation) amounts to six million bales. Its expected plan, not yet announced by the King Canutes in charge of the cotton tide, includes valorizing the present crop by no-recourse loans (equivalent, of course, to purchase) which will undoubtedly expand the administration's holding of this commodity to probably two thirds of an average annual crop.

IF the government should successfully interpret its power to dispose of that property (passing the validity of its acquisition, which appears to be nonjusticiable) as including the right to process the cotton into cloth and into all cotton products and market the manufactured goods in competition with the textile industry, the consequences are so obvious as to require no prophecy here.

And in this connection bear in mind the assertion by Congress, in the exercise of the postal power, of the right

to forbid competition along all post routes and post roads.

The Tennessee Valley Authority claims the right to put the existing Muscle Shoals steam-electric and hydroelectric units into the business of manufacturing electricity, without reference to government requirements, to pool this product with the output of an unlimited number of hydroelectric and steam plants throughout the Tennessee river basin, and distribute this energy by means of a permanent utility network reaching from Little Rock to Asheville and from Cincinnati to south of Birmingham. Its announced functions were to regulate existing utilities by competition, to supplement or supersede state regulation and to furnish a yardstick for the determination of the cost of electric service from power house to customer. To that end, it undertook to establish a market for its power. If that market could not be obtained from existing utilities serving the area by purchase of their facilities at prices negotiated under threat of competitive duplication, that duplication was to be undertaken either directly by TVA or through municipalities or coöperatives financed for the full cost by the government.

THERE is one aspect of those loans in the area of the Tennessee Valley Authority which has a constitutional bearing. Many of the municipalities have reached their constitutional debt limit and obviously cannot undertake to repay a loan for the construction of a competitive plant. They have adopted the device of the revenue bond. Its validity has been sustained to the extent that it disclaims any pecuniary liability whatsoever on the part of the town.

The Tennessee Valley Authority, in making available energy at the city gate, fixes the rates, controls the matter of accounting, the disposition of reserves and, in fact, exercises most of the functions that are responsive to the ordinary conception of management. The question there is whether or not the United States, in making loans, being the sole beneficial owner of the property at the outset, without one dollar invested by the town, dominating rates, service, reserves, is not, from a constitutional and from a legal standpoint, actually engaged in the operation.

ONE further illustration of the prevailing theory of the administration as to business functions will be sufficient, since no commercial activity could go farther in principle.

The Attorney General in a series of opinions (to the Secretary of Interior, Feb. 7, 1934; Oct. 21, 1933, etc.) asserted that wholly owned Federal agency corporations, such as authorized under § 203 of the Recovery Act, should be limited as to their corporate powers to those "necessary to carry out any program of public works authorized by § 202." This apt admonition was by no means followed. For a single illustration, the Electric Home and Farm Authority was organized pursuant to Executive order under color of the Recovery Act as a tramp corporation under the laws of Delaware with authority "to advance the general economic welfare of the nation by developing and fostering the increased use of electrical power through the reduction of the cost thereof to the consumer and through the reduction of the cost and price of electrical equipment and appliances," etc. Its powers included the usual array of functions ranging from an unlimited power to manufacture, deal in, and finance goods, wares, and merchandise of every class, likewise as to lands, securities, etc. The entire conception, including its capitalization through transfer of $1,000,000 of public funds, as an admitted agency to promote the ends of the Tennessee Valley Authority, seems to be a clear violation of Federal function and authority. Having diverted the million from recovery funds, it arranged for a ten million dollar credit with Reconstruction Finance Corporation and sent into the selected field of its operations a staff of sales economists and instal-

ment psychologists to promote appliance purchases. The Tennessee Valley Authority made it plain that unless the manufacturers of appliances coöperated, consideration would be given to Federal production of appliances.

If under the broad spending powers of the relief acts the Executive may thus validly create agencies, finance them out of the public treasury, and establish them in competition with citizens, it would seem desirable that this conception of constitutional authority should be charted.

The theory of the most outstanding of the gestures of the government in the direction of national proprietary operations (TVA) is that, having government property (steam and hydroelectric plants at Muscle Shoals and others to be acquired) which may profitably be made the basis of a manufacturing business, the government may organize and directly conduct the business, in order to earn money for the treasury and promote public ownership by direct Federal financing or competitive destruction of existing agencies or regulate by competition individual citizens engaged in the business. That conception is dealt with below. Here, the fact is of significance as a definite commitment of the administration to a comprehensive policy of production and regulation by the Federal government in competition with any business deemed appropriate by Congress. Through present control on a colossal scale by means of existing investment and, by virtue of the spending power or the war power, potentially to an unlimited extent, this result is within the range of Federal discretion if sanctioned by the Constitution.

The actual high watermark of this policy in point of practical monopolization through direct action is the program of the Tennessee Valley Authority. The most comprehensive effort to assert theoretical power over all business was the effort to declare that all commerce so affected interstate commerce as to subject production and intrastate trade as well as interstate prices and the processes of distribution to Federal control under the NRA codes.

The most recent exemplification of the intention of the administration to subject industry to Federal control by monopolizing the business (TVA) or by regulating it (NRA) is the public release by the President on July 6th of a letter to Hon. Samuel B. Hill, chairman of the Subcommittee of the Committee on Ways and Means of the House of Representatives, urging upon Congress the adoption of the Guffey-Snyder Bill, purporting, in effect, to declare that the entire business of mining and selling any and all bituminous coal throughout the United States affects the national public interest to such an extent as to justify Federal regulation of prices, that all production and all local sales of bituminous coal (regardless of actual competition) so directly affect interstate commerce as to bring both production and local sales within reach of Congress. There are many novel features of the so-called Guffey-Snyder Bill such as to the delegation to two thirds of the industry the right to fix hours and wages for the remainder (a strange conception in view of the Schechter Case and of Eubank *v.* Richmond [1912] 226 U. S. 137).

That production of coal is not within reach of congressional wage and hour regulation seems so settled, under the triple barrier of lack of power[17] and relationship[18] and the Fifth Amendment as to remove the suggestion of constitutionality from the category of reasonable doubt.[19] In the light of the Schechter Case the recital in the bill that all production affects interstate commerce (even where competition in interstate commerce is impossible) is naïve.

The $300,000,000 proposed by the Guffey-Snyder Bills to be used to recapture for the public domain mining properties (presumptively mines now in production, in order to reduce commer-

cial capacity) would result, like the Muscle Shoals plants, in continuing enticement to those committed to Federal proprietary operation.

Upon these considerations it is accordingly apparent that it is the policy of the administration, which holds in portfolio or in the administration of enacted and pending measures the actual or potential control of a vast segment of proprietary or commodity business in the United States, to assert Federal control directly or by competitive operation by the government whenever that course seems appropriate and without proposing an amendment to the Constitution. The program is in material respect in actual process, both by proprietary operation and by pending and proposed measures for the control of production both as to quantity and as to the terms of employment and price.

THIS actual competition in the market and the imminence of like Federal competition throughout the range of industry have made inevitable the necessity for a determination by the Supreme Court of the United States of the limitations upon competitive commercial operations by the Federal government.

It is plain that no such systematic and horizontal departure from common understanding of the functions of the Federal government was contemplated by the court in sustaining the corporate agency theory, either at the time of McCulloch *v.* Maryland or for a century later. In the South Carolina Dispensary Case (1905) 199 U. S. 437, Justice Brewer quoted with approval these words:

> Certain it is that if the possibility of a government usurping the ordinary business of individuals, driving them out of the market, and maintaining place and power by means of what would have been called, in the heated invective of the time, "a legion of mercenaries," had been in the public mind, the Constitution would not have been adopted, or an inhibition of such power would have been placed among Madison's amendments.

If the incidental powers of the Constitution as interpreted in particular cases having no such continuing and systematic result are by horizontal extension to be made the basis for any such casus as would confront American industry and business as a result of a systematic program to centralize all functions of control or operation in the Federal government, it is plain that a reconsideration of the decisions which accomplish that result would be necessary. A casus neither contemplated by the convention nor justified by the spirit and intent of the Constitution nor any expressly granted power, would plainly call for reconsideration of any particular case or line of cases relied upon to accomplish so grave a result.

AS stated by a well-known wit of a past generation, one swallow may not make spring, but five swallows may make an early fall if the dose is sufficiently dynamic. It is certain that the American system of private property under a dual system of government could not stand many swallows of the dosage now being compounded for the patient. The establishment of the Tennessee Valley Authority network and the general entry of the government into a commercial fertilizer business would alone establish a complete precedent for an all inclusive national collectivism. If the TVA succeeds in its objective it will at one stroke establish a monopoly of service, control, and regulation in its selected area.

Electric power is a primary war necessity; so is wool, steel; the entire range of useful commodities. To sustain the psychology of war, bond selling, and the so-called morale of the civilian population, perhaps all commodities of general consumption, whether necessary or not, have a war relation. Does it rest merely within the discretion of Congress whether it will prepare facilities for their manufacture during time of war and thereafter, in order to avoid the economic waste to the government from the idleness of the plants, undertake the permanent establishment and operation of

the plants during time of peace, throwing the economic waste on the citizen whose business is selected for competitive destruction?

OR does the same argument which relieved the citizen of trial before a drumhead court-martial outside of the real theater of war, applied in Ex parte Milligan (1866) 4 Wall. 2, relieve the citizen of drumhead death sentence to his business under the guise of making ready for a remote, unknown and unexpected war? "Extraordinary conditions do not create or enlarge constitutional power," although they may justify extraordinary remedies within the orbit of admitted power.—Schechter Case, citing Ex parte Milligan, *supra.*

The sale (or lease pending final disposal) of government property is one of the express powers granted to Congress (Art. IV–3–2). The cropping of timber from the public domain, the withdrawal and sale of oil to prevent drainage, the sale of war supplies left on hand, the sale of any type of property lawfully acquired and no longer required for government use, the lease of Federal buildings; even the maintenance of a going business (such as the Spruce Corporation) pending its *bona fide* liquidation or disposition, and like action as to properties or business taken over for taxes or to secure an obligation lawfully acquired by the government, all afford an obvious basis for legitimate commercial transactions by the government, of a limited and provisional character, presupposing, always, that the dominant and decisive objective which establishes the classification of the transaction is in fact disposition of government property and is not an effort to establish or commit the government to commercial and proprietary operations, that is, to a business as distinguished from an act, or to non-Federal objectives.

It is difficult to imagine any condition under which the establishment and operation of any permanent competitive business by the Federal government within state domain (other than the postal system and the maintenance under limited conditions not yet defined by the court of instrumentalities of interstate commerce) could be sustained as within the lawful power of the general government.

To sustain that conclusion as a major premise, it is interesting to review at the outset certain basic considerations:

(1) No provision of the Constitution authorizes the Federal government to engage in business as a function of government, or to make a profit. If and to the extent authorized it must rest upon a necessary and proper relation to an express power. We have already pointed out the doubt expressed by Chief Justice Marshall in Osborne *v.* Bank, as to the power of Congress to confer business powers not related to the Federal objective.

The school of legislative advocates supporting the Tennessee Valley Authority conception regards the general need of the government for revenue as sufficient to warrant the employment by the government itself of any property acquired or constructed by the government for governmental use in the conduct of any additional business or purpose to which the property may be profitably devoted in order to reimburse the treasury and avoid economic waste of the excess or idle capacity.

In view of the extent of the public domain and of the spending power, and of the power to provide by manufacture for peace supplies for the government as well as prepare all commodities of war, including the power to overbuild through honest mistakes of judgment (as well as the practical power intentionally to overbuild in order to create excess capacity for commercial purposes), if that conception could be sustained the delegates who imagined that they had fashioned a central government of delegated and limited powers, and that they had made provision for the protection of their commerce, would well merit universal derision.

It may be safely assumed that the assertion by the government of the power to engage in business must show a rational relationship to some expressly delegated objective.

(2) Permanent or continuing commercial functions are inherently inconsistent with the purpose and intent of the Constitution, are in derogation of the sovereignty and mandated responsibilities of the United States, and would be contrary to basic public policy as impeding the execution of national functions.

THE function of barter and trade is generically inconsistent with the theory of national sovereignty. It involves warranties, credit and civil responsibility, and a directness of contact with citizens in nongovernmental relations wholly inconsistent with the theory of the national system.[20]

It may well be that the government is justified, upon occasion, in withholding settlement and in claiming the traditional immunity from suit in respect to an admitted obligation. There is difference of opinion as to the ethics of the step, but there could be no difference of opinion upon the proposition that if the government goes into commercial business as a trader, peddling power and reading meters or selling washing machines or taking over and operating any of the thousands of industries within its investment portfolio, the theory of sovereign immunity was not extended to the Federal government in America to meet that case, if, indeed, the conclusion should not be sound that when the sovereign enters the market place as a trader it in fact lays aside its sovereignty. Ohio *v.* Helvering, *infra*.[21]

(3) A business in its nature permanent or continuing, from which the government could withdraw only by the sacrifice incident to liquidation or wholesale violation of contracts or service relations or bringing about economic disorder, particularly where entrenched by actionable long-term contracts or by the dependence of a substantial population on the service, as in the case of the Tennessee Valley Authority program, is intrinsically violative of the continuing duty of Congress to hold its legislative processes and policies free from commitment.

IF engagements by individuals having this tendency are void, Louisville & N. R. Co. *v.* Mottley (1911) 219 U. S. 467; Norman *v.* Baltimore & O. R. Co. (1935) 294 U. S. 240, how much the more contrary to public policy would be a commitment by the government agencies having the same result?

Article I, § 1, of the Constitution, which imposes upon Congress the enduring and nondelegable trust of the legislative power, can be as effectively violated by assuming continuing servitudes and by the pattern of contracts and obligations incident to a commercial business as well as by direct delegation and on principle should be as invalid in the one case as in the other.

(4) The Ninth and Tenth Amendments clearly exclude from the Federal government by reservation to the states or to the people the functions of proprietary business within state domain, except where such business may be related in time and function to some specific Federal power.

The Constitutional Convention of 1787 resulted from a call by the state of Virginia for a conference of the states to initiate a program for the protection of commerce. No other subject was mentioned in the call and delegates from a limited number of states met at Annapolis for that basic purpose. That conference resulted in the call for the convention of 1787. The second call was broadened as drafted by Hamilton, but the protection of commerce remained its basic motive and continued as the basic motive of the convention at Philadelphia. In fact, Rhode Island sent no delegates because Rhode Island preferred to retain the power to levy taxes on exports and imports produced in or destined for the interior.

THE bare idea that the delegates from any state would have ap-

proved the Constitution had it been suspected that the national government would assert a power to use the treasury, the national domain, Federal plants, buildings, and property of all kinds as the basis for proprietary operations for profit within state domain, involving the potential destruction of any private enterprise selected for competition by the government, including its agriculture, is too fantastic for serious consideration.

Virginia had only recently ceded the Northwest territory and North Carolina and Georgia were being urged and were expected to cede their claims to the territory now constituting the state of Tennessee. Other states were shortly to relinquish their claims to national domain. The delegates were familiar with the state monopolies of the Continent in staple commodities, salt, sugar, tobacco, spirits. These and similar products formed the basis of the wealth and the livelihood of the colonists who had recently fought a war for relief from the encroachments of government levied upon their commerce. The notion that the national power and national domain they were establishing could by bare majority in Congress, either for the purpose of treasury revenue or otherwise, be turned into competitive annihilation of the sustaining commerce of any of the states, or as a permanent business, would have put an end to the deliberations.

THE manifest reason why there are so few judicial precedents in relation to a power so colossal in its implications is that Congress has forborne to provoke the challenge or, in those cases in which it may have transgressed the bounds of Federal jurisdiction, the states or their citizens have forborne to demand judgment or have been without justiciable right under the doctrine of Massachusetts *v.* Mellon (1923) 262 U. S. 447.[22]

In United States *v.* Speed (1869) 75 U. S. 77, the government defended against a suit for damages for terminating a contract to slaughter and pack government hogs to furnish pork for the army on the ground that pork packing was an unauthorized business. The court said:

> If by this is meant that the War Department has no authority to enter into the business of converting hogs into pork, lard, and bacon, for purposes of profit or sale as individuals do, the proposition may be conceded. . . .

In the License Tax Cases (1867) 5 Wall. 462, the court said:

> No interference by Congress with the business of citizens transacted within a state is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature. The power to authorize a business within a state is plainly repugnant to the exclusive power of the state over the same subject.

In Kansas *v.* Colorado (1907) 206 U. S. 46, the court asserted that the Tenth Amendment

> disclosed the widespread fear that the national government might, under the pressure of a supposed general welfare, attempt to exercise powers which had not been granted. With equal determination the framers intended that no such assumption should ever find justification in the organic act, and that if, in the future, further powers seemed necessary, they should be granted by the people in the manner they had provided for amending that act.

So much for the certainty that the Constitution cannot upon general principles be regarded as warranting the conception of proprietary operations by the government, as a business, disassociated from the *bona fide* sale or disposition of government property, lawfully acquired.

The court has firmly established two principles of construction which leave little basis for looking to the commerce clause as a basis for Federal operation of competitive business beyond the exceptional field of the instrumentalities of interstate transportation, discussed below:

(1) The governmental power to regulate a business, that is, the legislative power over any given business, does not carry the right to engage in the business. Power to carry on the business must be looked for elsewhere. This

conclusion, reiterated in the line of cases beginning with South Carolina *v.* United States (1905) 199 U. S. 437 unanimously reaffirmed in Ohio *v.* Helvering (1934) 292 U. S. 360; Helvering *v.* Powers (1934) 79 L. ed. Adv. Ops. 141, while relating to state power, seems conclusive as to commercial operations by the government in so far as the commerce clause is concerned, except as to construction and maintenance of the physical instrumentalities by which interstate commerce is conducted, otherwise not available.

It is well to bear in mind in considering the scope of the commerce clause that the court has decisively distinguished between the provision and maintenance of an instrumentality such as a bridge for use by others in carrying on interstate commerce and the business of carrying on that commerce, over the instrumentality; and has in the recent case of Detroit International Bridge Co. *v.* Tax Appeal Board (1935) 294 U. S. 83, held that ownership and operation of such a bridge do not constitute interstate commerce, adhering to Henderson Bridge Co. *v.* Kentucky (1897) 166 U. S. 150. In short, upon all grounds, promoting and conducting commerce are distinct.

From this it seems assured that even if the construction or maintenance of an instrumentality for commerce should, notwithstanding the fact that adequate instrumentalities and service at reasonable rates, established by the government itself, are in existence in any given area, be held within the power of Congress as a regulation, or rather, promotion of commerce, this involves no conclusion that engaging in the commerce by means of the instrumentality can under any circumstances be held to be a function of regulation or justified under the commerce clause. The power, accordingly, seems lacking for the government to regulate commerce by engaging in it, relationship to the commerce clause being lacking in the mere substitution of Federal for private operation, as well as being plainly, by definition, beyond the scope of the term "regulation." The License Tax Cases, *supra*, clearly apply unless there is some other Federal power to justify the business.

The court has consistently asserted that the commerce clause is not to be construed as conferring power on Congress to accomplish permanent collateral objectives having no functional relation to the flow of commerce, Adair *v.* United States (1908) 208 U. S. 161; Railroad Pension Case (1935) 79 L. ed. Adv. Ops. 803, and that general declarations of a constitutional purpose are not to be permitted to enlarge the traditional application of the Constitution. Hammer *v.* Dagenhart (1918) 247 U. S. 251, 276; Bailey *v.* Drexel Furniture Co. (1922) 259 U. S. 20; Linder *v.* United States (1925) 268 U. S. 5; Panama Refining Co. *v.* Ryan (1935) 79 L. ed. Adv. Ops. 223; Schechter Poultry Co. *v.* United States (1935) 79 L. ed. Adv. Ops. 888.

The possibility that the court would hold that Congress may regulate a particular business by competing with the citizens engaged in the business is incredible, since no instance can be conceived of in which regulation in its accepted sense would not exhaust the full power of Congress.

It was indeed the apprehension of Jefferson (February 7, 1788) that monopoly might be encouraged under the commerce clause, and he desired an amendment to prohibit that result. Virginia's proposed Eighth Amendment was to require the two-thirds vote for approval of commercial regulations. But neither Jefferson, who insisted merely that clarifying amendments should be attached (hoping passionately that eight states would ratify and that the ninth would successfully demand the amendments), nor any one opposing the ratification of the Constitution, expressed the apprehension that the Federal government itself was given any power to monopolize by engaging in the business constituting commerce.

EQUALLY trite because of its certainty is the observation that the basic objective of the overwhelming majority of the delegates to the convention was the determination to protect the states against any encroachment by the Federal government beyond the prescribed and delegated functions.

Madison records the proposal of 126 amendments by the ratifying states, "all of them intended to circumscribe the powers granted to the general government by explanations, restrictions, or prohibitions." Unanimous expressions from the members of the convention of the common and general concurrence on part of the people in the view that the Constitution involved no such consequences, resulted in the acceptance of the Constitution without further assurances than the ten amendments.

It is noteworthy that the only absolute provision of the Constitution against the power of taxation both of the Federal and state governments, the most important of all of the powers of government and a basic weakness of the Confederation, are Art. I, § 9, Clause 5, denying unconditionally to the Federal government any power to levy a tax or duty on the outgoing commerce of the states (exports), and Art. I, § 10, Clause 2, limiting the power of the states in taxing imports and exports, that is, commerce, to those "absolutely necessary for executing inspection laws," and, by an amendment added by the Committee on Revision on almost the last day of the convention, to Art. I, § 9, Clause 5, providing that in regulating commerce or revenue no preference shall be given to the ports of one state over those of another, again protecting commerce.

SPEAKING with reference to the commerce clause, Madison in his letter to Cabell of February 13, 1829 (III Farrand 478), stated:

> . . . it is very certain that it grew out of the abuse of the power by the importing states in taxing the nonimporting, and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purpose of the general government.

Every remote government in the world inhabited by citizens on the frontier of civilization as well as those states whose people are losing the capacity for self-government, have reserved unto themselves by their political organization the right to prevent dumping by foreign nations of commodities destructive of their commerce. Yet it is insisted that James Wilson and Gouveneur Morris, Madison and George Mason, the Pinckneys, and their colleagues, drafted an instrument which permitted the general government to select at will areas within state domain for dumping products to be manufactured and marketed in a proprietary capacity by the government of the United States, or directly to monopolize the business.

The "power to regulate" commerce does not carry with it the right to destroy or impair those limitations and guaranties which are placed in the Constitution or in any of the amendments to that instrument. Monongahela Nav. Co. *v.* United States (1893) 148 U. S. 312; United States *v.* Joint Traffic Asso. (1898) 171 U. S. 505, 571.

SINCE the suspended fate of the American railroads may at any moment come within the reach of the program of centralization noted above, by reason of collateral loans or original intention, the case of interstate instrumentalities is of great importance.

(2) As to the apparent paradox that construction or maintenance of a facility of interstate commerce is a regulation of commerce, within the meaning of the Constitution, it is obvious that the court has not said the final word. The history of the provision, its administration and the judicial decisions relating to the construction of the instrumentalities of commerce, are of absorbing interest and well deserve a more elaborate analysis than can be afforded in this discussion.

The convention as late as September 14, 1787, refused by vote of eight states

to three to include the power to cut canals or grant charters of incorporation. Madison vetoed Calhoun's bill for the construction of canals as beyond the power of Congress. Hamilton conceded, in his opinion as to the power of Congress to create the first bank, that no power existed to construct canals or to create corporations for that purpose. Monroe vetoed the act for the maintenance of the Cumberland road (primarily because it carried the right to take tolls). Jefferson had approved the acts for the building of the road, which expressly required concurrence by the states, asserted by Gallatin to be indispensable, but Madison asserted that state consent was inadequate to justify the "train of powers" incident to the construction of roads, canals, and improvement of water courses.

WHILE these early doubts are buried under the settled decisions sustaining the power of Congress to improve navigable waters and, in general, to authorize (by charter or franchise) or construct instrumentalities of interstate commerce where constitutionally related to the "regulation of commerce," with full discretion in Congress within that relationship, it is far from settled that the power of Congress is without limitation.

There is time and space here for bare mention of a few of many aspects of this profound question.

Conceding that, beginning prior to Mobile *v.* Kimball (1881) 102 U. S. 691, and running through the Pacific Railroad Cases [23] to Wilson *v.* Shaw (1907) 204 U. S. 24, the power to construct interstate highways by land and water (and to create or grant franchises to corporations to that end) has been so definitely established as to silence all questions as to the reasoning by which the power to regulate was held to include the power to promote and hence to improve navigable waterways and construct highways of interstate commerce, contrary to the understanding of the Constitution by the weight of opinion of the delegates to the convention, there still remain these significant facts:

1. There appears to be no decision sustaining the power of the government to take over an existing facility and engage in the general business of transportation within state domain, interstate or intrastate. The decisions in the Removal Cases, in California *v.* Central P. R. Co., in the Luxton Case, and in the Monongahela Case alike dealt with the power of Congress to create Federal corporations or grant franchises to state corporations to construct or operate interstate railways or bridges.

THESE grants were under peculiar conditions which probably no longer exist. They do not exist manifestly as to the existing lines. The grants were in furtherance of new routes where no agencies for transportation existed. This was the inverse of the situation in Wilson *v.* New. The doctrine of relationship existed for their creation, but to assert that it is "regulating commerce" for the government to take over an existing instrumentality serving the people is a *non sequitur*. It is merely to substitute government operation for private operation, whereas the power to provide the facility was the reasonable necessity for the facility and not for government operation of it.

None of the decisions grazes the question of the present power of the government to take over a system now operating and willing to continue.

Not one involved the conduct of the business of transportation by the government, interstate or intrastate. The Panama Canal Case involved territorial legislation and is obviously no precedent, being, moreover, obiter if it is held to graze this question.

2. There are fundamental distinctions between granting a franchise to a corporation as a private agency serving an admitted Federal function and the direct exercise by the government of all of the powers which could be granted to the corporate agency. This distinction has been pointed out in connection with the national bank powers, where com-

petitive survival of a private agency is held to warrant the grant of powers (having merely a revenue basis and no relation whatever to a Federal function) which obviously the government could not under any circumstances draw to itself or to a wholly owned Federal corporation.

ANY other conclusion upon that distinction would apparently lead to a *reductio ad absurdum* of the Constitution. It accounts for the fact that the Federal (privately owned) agencies of transportation have, on occasion, received from the Federal government grant of power to conduct intrastate as well as interstate business, apparently without judicial challenge.

But the court has not, so far as the commerce clause is concerned, announced any conclusion that Congress is authorized to regulate commerce by building, equipping, and operating a trunk line railway and engaging in a general and permanent commercial business to that end. The question of relationship of all the numerous functions discharged in a general railroad business does not appear to have passed under review so far as the Federal government as the operator is concerned. A single phase of the question will be considered, that of intrastate business.

3. The assertion for the Federal government of the power under the commerce clause not only to provide but to operate instrumentalities of transportation, overreaches the mark in claiming the power to conduct a general intrastate business by means of the instrumentality. Conceding for the discussion that the power to provide for, aid, and assist in the construction, maintenance, or improvement of interstate highways carries the right to operate the business of supplying interstate service, nothing is found in the decisions interpreting or applying the commerce clause to justify the conclusion that Congress may engage in the business of local transportation as a constitutional incident to the maintenance of an interstate instrumentality.

CONGRESS may provide for the regulation of the intrastate charges made by an interstate carrier, as a function of the interstate agency undertaking also intrastate service. This is because of the paramount right under the commerce clause to regulate the interstate instrumentality in its entirety and not because there is any inherent and inseparable relationship between interstate and intrastate commerce. The contention that interstate and intrastate commerce are intrinsically inseparable, so that the regulation of intrastate rates necessarily and directly affects interstate rates, was urged by the carriers, and was expressly considered and repudiated in the Minnesota Rate Cases (1913) 230 U. S. 352, 432. In short, there is no such inseparable relationship between the conduct of interstate and intrastate commerce as carries into the commerce clause the authority to Congress to put the government in the business of intrastate carriage.

Hence it may be stated with confidence that so far as the commerce clause is concerned, the decisions asserting power of Congress to construct canals and railroads have settled neither the right of the government to engage generally in the permanent business of operating these facilities in all of their varied functions or, indeed, in interstate transportation; that, as to intrastate operations, there is discernible in none of the decisions approval of the right to engage in intrastate commerce in order to regulate or promote interstate commerce; and that the power to construct or provide a facility otherwise lacking clearly does not authorize the government to take over the facility and substitute government for private operations.

A more plausible argument for taking over and permanent operation of the railroads can be based on the national defense powers; but here again the competitive functions and the current transaction of the complex business of interstate and intrastate transportation, so radically transgressing any discernible war function, and the re-

moteness of the necessity or propriety of government operation, appear to establish a lack of relationship.

THE best conclusion appears to be that the government can take over the existing railroads for interstate operations with a clear bill of health from the Constitution only to avoid tangibly threatened cessation of operations or substantial inadequacy of service; that is, to avoid the lack or an impasse as to the mechanics of transportation which justified the building of the Cumberland road and the canals in the first instance and the adoption of the Adamson Act in 1916 to avoid an explosive interruption of interstate instrumentalities after their construction.

Until conditions of that nature appear, purchase or condemnation for permanent interstate operation of the railroads by the government would seem to require an amendment to the Constitution.

Even with those conditions assumed, it does not appear that there is any constitutional relationship between government ownership and intrastate service.

Here, or elsewhere, the argument for government operation comes back to the question of the power of the government to use property for all purposes to which it may be adapted, as an incident to bare ownership, in order to avoid waste of capacity.

THE Inland Waterways Corporation (40 Stat. 360) (1924) is mentioned as a precedent to sustain Federal competitive operations. There has been no judicial challenge of the legality of this enterprise. Forbearance in challenging the operation was undoubtedly due, at the outset, to the assurance by the House Committee which reported the bill that if operated experimentally for five years the feasibility of the service would be demonstrated and the properties sold to private capital or proved to be economically impractical and dropped.[34] In 1928 Congress extended the experiment until (a) completion of the navigation projects authorized; (b) completion of adequate terminal facilities; (c) the establishment of joint rail and water tariffs and until "private persons, companies, or corporations engage, or (are) ready and willing to engage, in common carrier service on such rivers; then the lease or sale of the facilities under stated conditions is authorized."

The Shannon Committee recommended (Report, pp. 21, 37) that the service be "discontinued and liquidated by sale to private enterprise."

It may be that the improvement of navigation may lawfully include experimental operation on the reaches of the river to "light the path," or "turn over the machinery"; also that reasonable time was requisite for disposition of barge line equipment acquired during the war. These provisional and temporary aspects have faded. The operation has reached the point where it is plainly permanent and proprietary and gives rise to the question whether the government has any power under the Constitution to engage in a permanent business of operating commercially a barge line in interstate and intrastate commerce over those reaches of rivers where regulated transportation was and is available, between interstate points as to which both service and rates are regulated by the government itself.

THE added function of competitive operation suggests further serious doubt as to its justification; whether the effect was not merely to substitute government for private operation as an end in itself (whether for regulation or otherwise would not seem to be material). The service of the barge lines, in so far as it competes in intrastate commerce and regulates that commerce, plainly cannot be justified under the commerce clause in the absence of a showing of direct burden upon interstate commerce which is plainly nonexistent as a general proposition. To suggest that it can be justified under the property clause, as a utilization of barges and floating equipment owned by the government, seems plainly inapt,

as the barges were purchased for the service and the question comes back to the question of power to operate. The war power seems clearly inadequate here.

The property clause is the main, if not the sole, reliance for the argument advanced in support of commercial operations by the government, other than the notion (resting on no known power) that the government may lawfully regulate commerce by engaging in competitive business with the citizen.

The territory and property clause of the Constitution, Art. IV, § 3, Clause 2, is as follows:

> The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

THE most elaborate historical reference to the property clause is in the several opinions in Dred Scott *v.* Sandford (1857) 19 How. 393. From Justice Campbell's concurring opinion we excerpt this expression:

> Consequently the power to make rules and regulations, from the nature of the subject, is restricted to such administrative and conservatory acts as are needful for the preservation of the public domain, and its preparation for sale or disposition. The system of land surveys; the reservations for schools, internal improvements, military sites, and public buildings; the preëmption claims of settlers; the establishment of land offices and boards of inquiry, to determine the validity of land titles; the modes of entry and sale, and of conferring titles; the protection of the lands from trespass and waste; the partition of the public domain into municipal subdivisions, having reference to the erection of territorial governments and states; and perhaps the selection, under their authority, of suitable laws for the protection of the settlers, until there may be a sufficient number of them to form a self-sustaining municipal government—these important rules and regulations will sufficiently illustrate the scope and operation of the 3rd section of the 4th article of the Constitution.

IT should be noted that the territory and property clause is not scheduled among the delegated powers but is among the provisions dealing with state and Federal relations. It is not difficult to imagine the astonishment which would have greeted a suggestion in the convention that the property clause conferred the power of limitless competitive operation by the government within state domain.

The initial draft of the property clause was "to dispose of the unappropriated lands of the United States." (II Farrand, p. 321.) The clause in its final form was proposed and accepted twelve days later (ib., 458) apparently without debate. It is obvious that it was not considered as enlarging the affirmative powers of Congress within state domain.

At the time of the adoption of the Constitution, the Confederation had already become the owner (but without declared power under the Articles) of an extensive public domain, which Virginia had magnanimously ceded to the Confederation to quiet the bad feeling which was incipient as to its disposition in view of the conviction that the unsettled lands wrested from Great Britain by joint effort should be held for the common benefit. The property owned in common included "many articles of value besides this property in land, such as arms, military stores, munitions, and ships of war, which were the common property of the states, which neither the new government nor any one else would have a right to take possession of or control, without authority from them; and it was to place these things under the guardianship and protection of the new government and to clothe it with the necessary powers, that the clause was inserted."—Dred Scott Case (1857) 19 How. 393.

IF any arrangement under which the government makes use of its property, other than by lease or similar arrangement, is disposing of it, within the meaning of Art. IV, § 3, Clause 2, it necessarily follows that such use must be in the nature of a government use, since there is no proprietary right (except for governmental use, sale, or disposal outright) in property in the Fed-

eral government nor any right to engage in proprietary business except in furthering a power.

> The United States cannot hold property as a monarch may for private or personal purposes. Van Brooklyn *v.* Anderson (1886) 117 U. S. 151, 158.
>
> In the matter of disposing of the vacant coal lands of the United States . . . they were held in trust for all the people. United States *v.* Trinidad Coal & Coking Co. (1890) 137 U. S. 160.

It is a contradiction in terms to suggest that the government can "dispose of" its property for governmental purposes by committing it to permanent proprietary operation by the government itself for a purpose which has been repeatedly declared by the court to be a nongovernmental purpose. (South Carolina *v.* United States, Ohio *v.* Helvering, Helvering *v.* Powers, *infra.*)

The reason why it cannot engage in this proprietary manufacturing business and dump its products is because that is not a function of disposing of government property or making a rule or regulation for its property.

To dispose of government property, which includes the right to lease (United States *v.* Gratiot [1840] 14 Pet. 526) and, of course, to sell it, is vitally distinct from carrying on a proprietary business with the property. So of the "regulation" of government property permitted under the property clause. Regulation is a function of government distinct from operation. This was made clear and settled in the South Carolina and Ohio Dispensary Cases.

Speaking of the property clause, Mr. Justice Brewer asserted:

> Clearly it does not grant to Congress any legislative control over the states; and must, so far as they are concerned, be limited to authority over the property belonging to the United States within their limits. Kansas *v.* Colorado (1907) 206 U. S. 46, 89.

The distinction between proprietary operations by the states, and Federal proprietary operations, is so fundamental that it is strange that we find the former are referred to as authority or precedents for Federal commercial activities. Representative cases dealing with the state problem, dependent upon the state Constitutions and the question whether the function serves a public purpose, are Jones *v.* Portland (1917) 245 U. S. 217; Green *v.* Frazier (1920) 253 U. S. 233; Puget Sound Power & Light Co. *v.* Seattle (1934) 291 U. S. 619. Since under the Tenth Amendment all powers which are regulatory and governmental in character and pass the barrier of the Fourteenth Amendment are reserved to the states and the people, this discussion attempts no analysis of the legal principles affecting state or municipal proprietary activities, in competition with private enterprise. That phase of public operation and competition is important to be considered here because of the Supreme Court's firmly established conclusion that these proprietary operations by the states and their subdivisions may be within the range of public exigency and experiment within the states but are none the less commercial transactions within the reach of the full taxing power of the Federal government.[25]

This discussion pretermits the effect on government interim use of property acquired in violation of Federal function, including the question of the legality of the vast administrative program briefly outlined in the earlier section of the memorandum.

Assuming legal acquisition through foreclosure of collateral or for debt, direct purchase for a lawful purpose, lands held as part of the public domain, supplies left over from war purposes, or otherwise, the following seems a general summary of the lawful use which may be made of the property, as against the complaint of those who may otherwise be in position to complain of direct illegal competition:

(1) Sale of property;

(2) Acts of conservancy;

(3) Lease to private operators; including lease of mining rights, timber cropping, or otherwise;

(4) In case of buildings, no authority exists to establish and operate a business in order to make use of the building;

(5) In case of plants, no right exists to acquire materials to enter into production;

(6) In case of the going business which may be taken over, the obligation is to close them down or in good faith to operate the business where necessary to preserve the asset only to the extent necessary and so as to avoid unnecessary competition with private owners.

SINGULARLY enough the case of Clallam County *v.* United States Spruce Production Corp. (1923) 263 U. S. 341, is cited as authority for Federal right to conduct a business. On the contrary, that decision carefully points out that the commercial operations of the Spruce Corporation after the Armistice were solely in furtherance of liquidating its affairs.

> After the Armistice these activities have been directed to liquidating the corporation's affairs, although to accomplish it some further contracts have been made, but, as we understand, solely for that end. . . .
>
> In short, the Spruce Production Corporation was organized by the United States as an instrumentality for carrying on the war, all its property was conveyed to it by or bought with money coming from the United States, and was used by it solely as a means to that end, and when the war was over it stopped its work except so far as it found it necessary to go on in order to wind up its affairs.

That is conceived to be the procedure necessary to avoid the illegal operation of a proprietary business when the constitutional purpose has terminated.

The sharp point of difference between this interpretation of constitutional functions and that urged in support of discretionary utilization, without restriction, of government property, is that the latter insists that ownership carries the right, as an incident to ownership, to utilize for any purpose or as the basis for any use or business deemed by Congress to further the general welfare. Opposed to that assertion of power is over a century of constitutional history and practice, the action of the Presidents to the time of the present administration, and the certainty that the doctrine would directly invite a national collectivist society contrary to the known spirit and intent of the Constitution.

IN short, the whole question of Federal proprietary operations is one of organic function; if the commercial operations are in furtherance of a primary function they are authorized. In that limited sense they are governmental or, more precisely, constitutional.

When the organic objective ceases to justify the operation, they become merely proprietary and find no warrant in the Constitution.

> When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the Federal government is concerned. Ohio *v.* Helvering (1934) 292 U. S. 360; Helvering *v.* Powers, (1934) 79 L. ed. Adv. Ops. 141.

In South Carolina *v.* United States (1905) 199 U. S. 437, followed in the above cases, the dissenting justices asserted that the same conclusion would be true as to state taxation of nongovernmental functions of the Federal government. The distinction is, as has been seen, that a state may, so far as the Federal Constitution is concerned, become a trader under its municipal powers, but no such power within state domain has vested or can be vested in the Federal government.

> . . . the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain within the limits of a state or elsewhere except in the cases in which it is expressly granted. Pollard *v.* Hagan (1845) 3 How. 212.

The question is accordingly whether the transactions or course of transactions are in furtherance of a primary governmental function or necessary and proper to that end. Both the question of the end and the relationship of the means are subject, in proper cases, to

review by the court with the presumption of validity which attaches to statutory enactments.

It is quite true that there have been in recent years real or apparent ventures into proprietary business, generally in relation to reclamation or shipping or other instrumentalities of commerce, but these transactions did not reach the court for consideration of power. They are plainly too sporadic or exceptional to sustain any such interpretation as must be necessary to sustain the power of the government to go into business as a method for disposing of property or in order to make a profit or to regulate commerce.

> In United States *v.* Boyer (1898) 85 Fed. 425, 432, the court said: The learned counsel, in this connection, has cited various acts of Congress of a nature quite similar to the one in question, but no number of statutes or infractions of the Constitution, however numerous, can be permitted to import a power into the Constitution which does not exist, or to furnish a construction not warranted. They, too, must stand or fall, when brought in question, by the same principles which are to be applied alike in all cases.

The factors to be considered in weighing long-established functions were stated by the court in Myers *v.* United States (1926) 272 U. S. 52, at 170, 171:

> In the use of congressional legislation to support or change a particular construction of the Constitution by acquiescence, its weight for the purpose must depend not only upon the nature of the question, but also upon the attitude of the executive and judicial branches of the government, as well as upon the number of instances in the execution of the law in which opportunity for objection in the courts or elsewhere is afforded. When instances which actually involve the question are rare, or have not in fact occurred, the weight of the mere presence of acts on the statute books for a considerable time, as showing general acquiescence in the legislative assertion of a questioned power, is minimized. See also Panama Refining Co. *v.* Ryan (1935) 79 L. ed. Adv. Ops. 223.

United States Shipping Bd. Emergency Fleet Corp *v.* Western U. Teleg. Co. (1928) 275 U. S. 415, presents no challenge of constitutional power. The transactions involved were telegraphic messages which had been accepted and sent by the telegraph company. The sole question was the applicable rate, whether "government" rate or not. Held: that the cost and risk fell on the treasury and that the government rate applied.

The advocates of the power of the government to engage in business with any property owned by the government predicate the notion on an implied, or incidental right to make the property contribute to its amortization or cost or, in general, to supply revenue. If that implication existed, the government would have commercial power in state domain limited only by the restraint imposed by Congress upon its spending power: a somewhat illusory reliance.

The desire for reimbursement cannot be incidental to an organic power. Raising revenue is not in and of itself a primary function of government. The Federal government does not exist in order to raise revenue. Revenue is justified only for the functions of government.

In many of the statutes of the current dispensation the desire for revenue is stated as one of the purposes, *viz.:*

Senator Johnson's bill (May 13, 1935, Cong. Rec., p. 7637) to validate the undertakings found illegal as a result of United States *v.* Arizona (1935) 79 L. ed. Adv. Ops. 681, recites that the dam is for the purpose of improving navigation "and for the generation of electrical energy as a means of financially aiding and assisting such undertakings."

The Norris Bill to amend the Tennessee Valley Authority Act (March 23, 1935, S. 2357) calls for the manufacture and marketing of power "to assist in liquidating the cost or aid in the maintenance of the projects of the Authority."

The Boulder Canyon Project Act also contemplated disposition of energy "as a means of making the project herein authorized a self-supporting and financially solvent undertaking."

These fiscal reasons might provide economic justification. They do not supply constitutional power.

THE revenue and spending power of Congress rests on the tax clause (Art. I, § 8, Clause 1), providing as follows:

> The Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States.

and upon the Sixteenth Amendment, authorizing the levy of an income tax. The suggestion cannot be defended that the makers of the Constitution contemplated that proprietary commercial operations in the course of manufacture, trade, or any other function of commerce, should constitute a direct and primary source of national revenue for the purpose of reimbursing the treasury.

No one supposes that it is obligatory that the United States should furnish free those facilities in interstate commerce which it erects and maintains under its constitutional power. But the notion that the desire for return confers the power or can add anything to the power would be a misconception of constitutional theory.

THERE is a fundamental constitutional distinction between holding property for disposition or for reserve governmental use or permitting its availability to citizens, on the one hand, and proprietary commercial operations, on the other. The former is a function of property; the latter is a function of corporate or government power. One is ownership of property in trust for its delegated uses with the obligation to maintain. The other is the transaction of business.[28]

Of course the acquisition of property or commodities in order to lease or dispose of the property or commodity is something more than disposing of property, more than a static act. Such intention continued in effect would constitute doing business. Associated Pipe Line Co. *v.* United States (1919) 258 Fed. 800.

Operation of a plant by the government for the manufacture and sale of products is not a function of ownership of property but of the business of manufacture. Utah Power and Light Co. *v.* Pfost (1932) 286 U. S. 165; Detroit International Bridge Co. *v.* Tax Appeal Board (1935) 294 U. S. 83.

The theory for government operations is that all things may be done reasonably necessary or related to the disposition of government property, and that this includes the business of processing of raw materials to any refinement deemed necessary to work up the original material and market the highly specialized results. Slight consideration will demonstrate that this is a function decidedly broader than the sale or disposition of that which in fact is owned by the government. It is, first of all, a manufacturing business and it is a business or function involving the eventual sale not merely of the basic or original material but services, personnel, credit, risk, in short, of all of those essentially nongovernmental factors which make up the business of the citizen and are frequently if not generally, a much more important factor in the cost of the finished product than the original material.

THE general welfare qualification in the tax clause (Art. III. § 8, Clause 1), has been regarded as the open sesame for all expenditures, investments, and Federal activities deemed by Congress to be in the general welfare. That conception is an inquiry separate in itself. It is sufficient here to state that by no sort of distortion does the limitation upon the tax power appear to justify the actual employment of the vast appropriations which, under Massachusetts *v.* Mellon, are pouring out of the treasury in ceaseless and increasing flow. The dictum in Gibbons *v.* Ogden (1824) 9 Wheat. 1, that "Congress is not empowered to tax for those purposes which are within the exclusive

province of the states; the assertion by Story (Vol. 2, Com. on Const. of U. S. 153, 154) that "Congress may not, indeed, engage in such undertakings merely because they are internal improvements for the general welfare, unless they fall within the scope of the enumerated powers" and that "they can engage in such undertakings only as are means or incidents to its enumerated powers"; the case of Jacobson *v.* Massachusetts (1905) 197 U. S. 11, denying to the general welfare clause in the preamble to the Constitution any effect as a grant of power; the reassertion by the court that the sharpest exigencies for the public welfare do not enlarge the grants of power, stated in Missouri *v.* Holland (1920) 252 U. S. 416, reaffirmed in the Railroad Pension Case (1935) 79 L. ed. Adv. Ops. 803, and in the Schechter Case, leave no basis for doubt that primary powers are not to be extended by changed or exigent conditions or reaction by Congress to popular pressure.

IN short, the so-called progressive rule for the interpretation of a Constitution has no more support than it held, with the sword in its hand, when the court asserted in the Dred Scott Case that the meaning of the Constitution as to the power of the Federal government over the recognized property in slaves had not changed with the acquisition of a vast additional domain as to which the government held territorial jurisdiction. That the Constitution does not change its meaning was conceded for the minority in the South Carolina Dispensary Case (1905) 199 U. S. 437, speaking through Justice White:

> It is not of course denied by me that however varying may be the conditions to which the Constitution is applied, that instrument means today what it did at the the time of its adoption.[27]

With this assurance, the conclusion seems warranted that however difficult it may be to redeem a generalization from converging but not decisive cases, however vast may have been the extent of the spending power withdrawn from effective challenge by Massachusetts *v.* Mellon, however liberal the court may (properly) have been in declining to interfere with the discretion of Congress as to means to further lawful Federal objectives, the time comes when presumptions and trends must either be liquidated or the Constitution abandoned. No more spectacular instance of this "breaking point" can be found than the Panama Refining Company and Schechter Cases in relation to the delegation of power.

SO it is, that if and when the effort to employ any or all of the powers or presumptions leads clearly to the conclusion that the dominant intention of Congress is to enter into commercial and proprietary business as part of an unmistakable stride toward collectivism, it does not seem possible to doubt that, where a proper controversy is presented involving the question, the decision must be that the proposal is a violation of Federal function and prohibited by the Fifth or Tenth Amendments or both.

To this conclusion it is not necessary to depart from any precedent, or override a single case, for there are no cases to be found sustaining any such power.

Citations

[1] (1923) 262 U. S. 447.

[2] Throughout this discussion the word "business" is used to denote continuing operations proprietary and commercial in character in competition with privately owned business; and not the *bona fide* sale of property acquired for government use or in pursuance of a lawful governmental purpose, or occasional transactions.

[3] Juilliard *v.* Greenman (1884) 110 U. S. 421.

[4] Schechter Poultry Corp. *v.* United States (1935) 79 L. ed. Adv. Ops. 888.

[5] Beveridge, Life of John Marshall, 463.

[6] Warren, Sup. Ct. in U. S. Hist. 284.

[7] Feb. 8, 1933. House Rep. No. 1985, 72d Cong., 2d Sess. H. Res. 235.

[8] Inland Waterways Corporation, Commissaries, Federal Farm Board and Farmers National Grain Corporation.

[9] The Hoover Dam Contracts—Wilbur and Ely, U. S. Department of Interior, 1933.

[10] See lease of Kanawha Dams, Report Fed. Power Comm., 1934, page 147, No. 1175. As to lease generally, United States *v.* Gratiot (1840) 14 Pet. 526.

[11] First National Bank *v.* Fellows ex rel. Union Trust Co. (1917) 244 U. S. 416; Missouri *v.* Duncan (1924) 265 U. S. 17, as to Federal land banks, Smith *v.* Kansas City Title & T. Co. (1921) 255 U. S. 180; Federal Land Bank v. Gaines (1933) 290 U. S. 247, and Federal Land Bank *v.* Priddy (1935) 79 L. ed. Adv. Ops. 709, alike assert that these banks "are instrumentalities of the Federal government, engaged in the performance of an important governmental function." Plainly the extent to which this line of cases will permit Congress to go in authorizing powers to corporations which the government could not claim for itself, calls for more definite definition than is to be found in the cases cited.

[11a] John Marshall: *One Hundred Years After*, by Robert B. Tunstall, July 2, 1935, Pennsylvania Historical Society.

[12] The suggestion of Senator Norris that a two-thirds vote be required to annul an act of Congress would be naïve if it were not depressing in its misconception of a dual system having a boundary to be established by judicial decision and not civil discord; as well as its misconception of the power of Congress over the judicial function. The bare majority which would, without result, vote to annul the act of Congress would affirmatively sustain state action within the disputed zone and leave the settlement of the debate to local disorder and the utmost judicial chaos, according as the citizens might present the controversy. The suggestion overlooks the function of the judiciary and is a recrudescence of the silly assertion that the function of judicial interpretation of the Constitution was usurped by the courts notwithstanding the fact that the uniform assumption in the Convention of 1787 that the court would restrict the Federal government within the bounds of its delegated powers provoked no challenge of that necessary conclusion; Farrand, Records of Fed. Conv. I–97, II–27, 28, 73, 78, 93, 298, 299; Elliott's Debates II–196, 445, 446.

The House of Representatives, in order to have its way over the Constitution in the Reconstruction Acts, passed a bill requiring that two thirds of the justices must concur in any adverse opinion. It failed of passage by the Senate, but Lyman Trumbull introduced another forbidding the court to take jurisdiction in any case arising out of the Reconstruction Acts, which also failed.

Sections 1 and 3 of Art. III of the Constitution vest the judicial power of the United States in the Supreme Court and in such inferior tribunals as may be established by Congress and expressly provides that this power shall extend to all cases in law or equity arising under the Constitution. The notion that this mandate can be impaired by interference with the judicial function invoked in a case squarely contemplated by the Constitution seems to lack constitutional as well as mechanical validity.

[13] Emergency Fleet Corporation, United States Grain Corporation, United States Sugar Equalization Board, War Finance Corporation, United States Housing Corporation, United States Spruce Corporation, and Russian Bureau, Inc.

[14] 8 F. Supp. 893; 9 F. Supp. 800; 9 F. Supp. 965.

[14a] On July 17th, the circuit court of appeals, without discussion of the power of Congress to authorize the permanent, commercial operation of a war plant or the findings of the district court that the dominant objectives of the TVA program were permanent, utility in type, non-Federal in character and therefore illegal, reversed the decision of the district court, holding that under the commerce clause Congress could authorize the construction and commercial operation of hydro-electric plants in navigation dams; and that the right to dispose of the resulting manufactured product (electricity) made the motives of TVA immaterial.

The decision dropped from consideration a basic question in the case of the commercial operation of the spent-purpose steam plant, additional inland steam plants acquired by TVA in north Mississippi and the fact that the district court found that the existing and proposed hydro-electric plants had no relation to the regulation of navigation. Nor does the decision analyze the distinction between proprietary use of the surplus waters by and vested in the state, and the constitutionally distinct appropriation by TVA of this surplus for commercial power production in order to establish a permanent electric utility system in state domain. Pending certiorari, the circuit court of appeals has directed stay of the mandate. The final decision in this case by the Supreme Court will determine whether Congress can under guise of constructing a plant for war or for manufacture of Federal supplies, employ an intentionally provided surplus or idle plant capacity in commercial production and competition in state domain by means of a permanent business functioning under 25-year contracts.

[15] Federal Intermediate Credit Bank (1923), 43 Stat. 1454–1492, and Inland Waterways Corporation (1924) 43 Stat. 360.

[16] Agricultural Adjustment Administration, Banks for Co-operatives, Commodity Credit Corporation, Electric Home & Farm Authority, Inc., Export-Import Banks, Farm Credit Administration, Federal Credit Unions, Fed-

eral Deposit Insurance Corporation, Federal Farm Mortgage Corporation, Federal Housing Administration, Federal Land Banks, Federal Prison Industries, Inc., Federal Savings and Loan Associations, Federal Savings and Insurance Corporation, Federal Subsistence Homesteads Corporation, Federal Surplus Relief Corporation, Home Loan Banks, National Mortgage Associations, Production Credit Corporations, Public Works Emergency Housing Corporation, Regional Credit Corporation, Tennessee Valley Authority, Tennessee Valley Associated Coöperatives, Inc.

[17] Specific references to coal mining are Wolf Packing Co. *v.* Court of Industrial Relations (1923) 262 U. S. 522, 536, P.U.R. 1923D, 746; Coronado Case (1922) 259 U. S. 344, 407, 408; Hammer *v.* Dagenhart (1918) 247 U. S. 251, 272; Delaware, L. & W. R. Co. *v.* Yurkonis (1915) 238 U. S. 439, and the principle that mining and production are not and do not directly affect interstate commerce are so unanimous and consistent as to explode the possibility of a contrary decision. Utah Power & Light Co. *v.* Pfost (1932) 286 U. S. 165, 180–1; Oliver Iron Mining Co. *v.* Lord (1923) 262 U. S. 172, 178; Kidd *v.* Pearson (1888) 128 U. S. 1; Heisler *v.* Thomas Colliery Co. (1922) 260 U. S. 245; United States *v.* E. C. Knight Co. (1895) 156 U. S. 1; Champlin Refining Co. *v.* Oklahoma Corp. Commission (1932) 286 U. S. 210; Crescent Cotton Oil Co. *v.* Mississippi (1921) 257 U. S. 129; Dumont Glue Co. *v.* United States Glue Co. (1903) 187 U. S. 611.

[18] Even if the business of mining coal for sale in interstate commerce could be (fantastically) declared a utility in interstate commerce, no decision of the Supreme Court appears to warrant the conclusion that regulation of hours and wages of production would be within the range of accepted means or instrumentalities to regulate the subsequent commerce. Coal is a necessary commodity as to which there is an admitted overcapacity for production. Wilson *v.* New (1917) 243 U. S. 332, presented a threatened nation wide stoppage of the instrumentalities of interstate commerce, an explosive situation plainly regarded by the court as exceptional and in no sense paralleled by the threat to withdraw even a majority of the bituminous mine workers, with carriers and utilities fully stocked, yards filled, substitute fuels waiting to take the market and a large percentage of the mines prepared to operate.

That the bituminous coal producers have done nothing to bring their operations within the reach of wage and hour or price regulation, within the meaning of Nebbia *v.* New York (1934) 291 U. S. 502, 2 P.U.R.(N.S.) 337 (treating that case as by analogy stating the conditions under which price fixing may be considered in the regulation of interstate commerce) seems obvious; and that their business cannot be condemned to idleness except on condition that the producers acknowledge their business to be a public utility and submit to regulation as such, without violation of the Fifth Amendment, would also seem incontestable. Frost *v.* California R. Commission (1926) 271 U. S. 583, P.U.R.1926D, 483; Pipe Line Cases (1914) 234 U. S. 548.

[19] This idea of congressional control of an ordinary business of manufacture or production, based upon the threat or possibility of strike likely to interrupt interstate commerce into or out of the plant, carries the doctrine to its inevitable result in the Wagner Act, which deals with the producers singly, disassociated and making use of no common mechanism for clearing their sales; and in effect asserts that the control of all material factors of independent production so directly affects interstate commerce as to authorize Congress to take hold of the entire industry and each unit in the industry, a naive conception (already discussed as to coal production) in view of the long line of decisions from Kidd *v.* Pearson in 1888, through the Oklahoma Oil Case (286 U. S. 210 [1932]) to the Schechter Case.

[20] The operation of the Electric Home and Farm Authority, Inc., in pressing instalment purchasing of electric gadgets with all of the over-statement and stage properties of an off-color merchant, is an apt illustration of the loss of dignity, of respect, and of loyalty which the government must inevitably sustain if it enters permanently the market place. These are not constitutional impediments in themselves but enter the determination of the nature and determining relationship of the function to a primary power. If the agency claims immunity from civil responsibility for shoddy goods and shoddy practices, the loss in prestige is the more assured. If it does not, the result is none the less baleful from the standpoint of a government supposed to have been limited not merely to governmental functions but to governmental functions within a rigorously prescribed area.

[21] In Federal Land Bank *v.* Priddy (1935) 79 L. ed. Adv. Ops. 709, the court asserted as to Federal agency corporations performing a governmental function, "as such, so far as they partake of the sovereign character of the United States, Congress has full power to determine the extent to which they may be subjected to suit and judicial process." Do functions partake of the sovereign character of the United States when they are of essentially commercial character?

[22] Fairchild *v.* Hughes, 258 U. S. 126, Florida *v.* Mellon, 273 U. S. 12.

[23] Removal Cases (1885) 115 U. S. 1; California *v.* Central P. R. Co. (1888) 127 U. S. 1; Luxton *v.* North River Bridge Co. (1894) 153 U. S. 525; Monongahela Nav. Co. *v.* United States (1893) 148 U. S. 312.

[24] "If the government, after making these rivers navigable, cannot profitably operate a transportation system on them, then it is hopeless to expect private capital to do so, and

Congress should no longer appropriate money from the Public Treasury for a useless purpose. Therefore the committee was of the opinion that this bill should pass in order that this pioneering demonstration might be conducted by the Secretary of War until such time as its success or failure may be made apparent."

[35] South Carolina *v.* United States (1905) 199 U. S. 437; Ohio *v.* Helvering (1934) 292 U. S. 360; Helvering *v.* Powers (1934) 79 L. ed. Adv. Ops. 141.

[36] Von Baumbach *v.* Sargent Land Co. (1917) 242 U. S. 503; Flint *v.* Stone Tracy Co. (1911) 220 U. S. 107; Zonne *v.* Minneapolis Syndicate (1911) 220 U. S. 187; McCoach *v.* Minehill & S. H. R. Co. (1913) 228 U. S. 295; United States *v.* Emery, B. T. Realty Co. (1915) 237 U. S. 28; Lucas *v.* Extension Oil Co. (1931) 47 F. (2d) 65, and cases cited.

[37] See "Creation of Government Corporations (Culp) 33 Mich. L. Rev. 473 (February, 1935) at p. 499, et seq.; Lawson, The General Welfare Clause (1926) chaps. 2, 3, (pp. 60–70).

The Conclusiveness of Administrative Fact—Determinations Since the Ben Avon Case

By JOHN DICKINSON*

THE question of the scope of judicial review of administrative findings of fact was first brought dominantly to the attention of the Bar in connection with the Hepburn Amendments to the Interstate Commerce Act during the congressional session of 1905–6.[1] Prior to that time, the Interstate Commerce Commission could not enforce an order without a complete trial *de novo* of the facts and merits in the Federal court, where the commission's findings were merely *prima facie* evidence.[2] The Hepburn Amendments, as finally adopted, provided that when the commission applied to a court for the enforcement of one of its orders, the court should merely determine whether the order was regularly made and duly served. It was also provided (Amendment to § 15), that orders of the commission might be suspended or set aside by a court of competent jurisdiction, but the grounds or scope of review in such a proceeding were not specified. In a series of cases beginning with Interstate Commerce Commission *v.* Illinois C. R. Co. (1910) 215 U. S. 452, the Supreme Court held that on this state of the statute it was not open to the reviewing courts to re-examine conclusions of fact reached by the commission, even as to such ultimate facts as discrimination, reasonableness, and the like. On any other construction of the law, said Chief Justice White, "the commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action." United States *v.* Louisville & N. R. Co. (1914) 235 U. S. 314.

THE Supreme Court did, however, establish from the outset one limitation on the finality of the commission's conclusions, namely, that they must be supported by evidence, saying, in Interstate Commerce Commission *v.* Union P. R. Co. (1912) 222 U. S. 541: "The conclusion of the commission is of course subject to review, but when supported by evidence, is accepted as final; not that its decision can be supported by a mere scintilla of proof, but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order." The same limitation was expressed in Interstate Commerce Commission *v.* Louisville & N. R. Co. (1913) 227 U. S. 88: "The courts will not review the commission's conclusions of fact by passing upon the credibility of witnesses or conflicts in the testimony, but . . . a finding without evidence is beyond the power of the commission. An order based thereon is contrary to law." In other words, whether or not there is evi-

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dence reasonably sufficient to support a conclusion of fact is a question of law and as such may be reviewed, even though administrative findings of fact are made conclusive and the scope of review is limited to questions of law.

Shortly before the Hepburn Act, the Supreme Court had greatly extended the doctrine of administrative finality in the striking Ju-Toy Case (1905) 198 U. S. 253, where it was held that even though administrative officials have no lawful jurisdiction to act against a citizen, nevertheless, the finding of the officials as to the jurisdictional fact of citizenship is conclusive on the courts. Indeed, the finding thus accepted as conclusive was not merely as to a jurisdictional, but as to a constitutional fact, since the claim was put forward by Ju-Toy that as a citizen he would be deprived of due process if banished by mere administrative action.

THE question of judicial review of fact determinations was discussed during the decade between 1910 and 1920 without much consciousness of the distinction thus suggested between determinations which involve constitutional issues and those which do not. Indeed most discussion of the problem of review in the opinions and elsewhere bear a certain appearance of inconsistency, largely because the approach was not infrequently from the standpoint of older types of administrative action, such as the licensing of pilots and masters of vessels, inspection for safety or sanitation, the exclusion or taxation of imports, and the like, whereas much of the newer legislation involved administrative decisions and orders made after more or less elaborate *quasi* judicial procedure for the regulation of the business practices of individuals and corporations. The older licensing and inspection statutes ordinarily contained no specific provisions for judicial review and administrative action under them had frequently been accepted as final by the courts. Now that administrative control was expanded to a far wider range of human acts, and to acts which not merely had no taint of moral wrong, but whose ill effects depended on special views of economics or public policy, it became clear that administrative action could not be left safely to its old summary forms, but must be molded to the likeness of judicial procedure with proper requirements for notice, hearing, presentation of testimony, the making of a record, and the like. With administrative action surrounded in the new statutes by these safeguards, it was argued that its title to finality, subject to proper limitations, was enhanced. On the other hand, the attitude of dislike, which in many quarters still prevailed toward the newer forms of regulation, kept alive the demand that even where administrative determinations had been reached as a result of such *quasi* judicial procedure, they should nevertheless be subject to full reëxamination on the facts and merits in a court of law.

ON the whole, the latter point of view, represented by Senator Foraker's speech against the Hepburn Act, fought a losing battle and, subject to the danger always inherent in attempting to summarize a whole era in a sentence, it is perhaps not inaccurate to say that during the period from 1905 to 1920 two conclusions seemed to be definitely establishing themselves, both in statutory draftsmanship and in judicial decision: first, that where an administrative order was made after full *quasi* judicial procedure, review of that order in a court of law should be upon the record as made before the administrative tribunal rather than upon new evidence produced in court; and, secondly, that in such review on the record the court should limit itself to review for errors of law, including among the latter the making of a finding of fact without reasonably sufficient evidence to support it.

The question of the applicability of these principles where a question of constitutional right is raised and where the administrative finding is as to a fact on which the determination of the con-

stitutional issue depends was first brought squarely to an open and consciously recognized issue in the Ben Avon Case, decided in 1920, 253 U. S. 287, P.U.R.1920E, 814. There the Supreme Court held that where under state procedure judicial review of an order of an administrative tribunal was by appeal to a court upon the record of testimony made before the tribunal, it was denial of due process for the legislature to provide that the court should be limited to determining whether the fact conclusions of the administrative body rested on reasonably sufficient evidence, where those conclusions were as to facts on which a question of constitutionality depended.

In other words, the court, as its position is seen in the light of later decisions, drew a definite distinction between facts pertinent simply to the statutory authority of an administrative body and facts going to the constitutionality of its action.

More than a decade later, in Crowell *v.* Benson, decided in 1932, 285 U. S. 22, the Supreme Court came for the first time squarely to grips with the other question, namely as to the record from which a reviewing court is to reach its independent conclusion on a fact which goes to the constitutionality of the action of an administrative body. The court held that, so far as related to the type of administrative action before it in that case, the fact conclusions of the reviewing court might not be based solely on the record of testimony made in the administrative proceeding, but must rest on evidence presented independently to the court. It is certainly too early to say how broad or how narrow of application is the rule laid down in Crowell *v.* Benson, *supra,* but at least one court has understood it as a rule of general application to the review of all administrative determinations of a *quasi* judicial character.[3]

It is not my purpose here to discuss the implications or the advantages or disadvantages of the rules laid down in the Ben Avon Case and in Crowell *v.* Benson.[4] Every lawyer knows how unsatisfactory it is, especially in the field of constitutional jurisprudence, to reduce such decisions to clean-cut formulations of horn-book law. Yet it is none the less true that cases are influential precisely in the degree to which they tend to become reduced in the mind of the profession to horn-book law.

This much, however, seems clear, that the effect of these decisions has been to some extent to stem the tide, which prior to the Ben Avon Case has been running in favor of general acceptance of the conclusiveness of administrative fact determinations made on the basis of an administrative record. Without undertaking to discover any existing trend today one way or the other, the time seems appropriate to take, as it were, a snapshot photograph on the basis of the recent decisions and the statutory provisions of the present state of the law with respect to judicial review of administrative fact determinations in the more important fields of administrative regulation. I refer now not to fact determinations going to the issue of constitutionality, like those involved in the Ben Avon and Crowell Cases, but to fact determinations in general. While it is obviously impossible to cover all the fields, or even all the principal fields, of administrative regulation, I wish to examine the provisions for review contained in a number of the more significant regulatory statutes of the Federal government enacted during the decade preceding March 4, 1933, and also the state statutes enacted or amended during the same period in three important fields.

The Federal statutes to which I shall more specially refer are the Water Power Act of 1920, the Packers and Stockyards Act of 1921, the Grain Futures Act of 1922, the Board of Tax Appeals Act and the Veterans Relief Act, both of 1924, and the Radio Act of 1927.

Perhaps the first thing that strikes one in examining the provisions of these

statutes which relate to judicial review is their extreme variety and dissimilarity. In a number of instances the provisions are elaborate and outline the review procedure with fullness and particularity.

This is true for example of the Packers and Stockyards Act, the Grain Futures Act, and the Radio Act. In other instances the provisions are meager and leave much to judicial construction. I shall first take one of the statutes falling in the latter class, the Veterans Relief Act of 1924.

The only provision of the Veterans Relief Act relating to review of the wide authority vested by the act in the Director of the Veterans' Bureau is a provision that the director "shall decide all questions arising under this chapter and all decisions of questions of fact affecting any claimant to the benefits . . . of this chapter shall be conclusive, except as otherwise provided herein." The director's authority extends to such matters as determining whether or not a veteran applicant for relief is to be rated for the benefits of the act as permanently and totally disabled, whether or not an applicant is suffering from a compensable disability, etc. In Silberschein *v.* United States (1924) 266 U. S. 221, a veteran whose claim had been rejected by the director brought suit against the United States for compensation on the ground that the director's decision was contrary to the proofs and to the weight of the evidence.

The Supreme Court construed the statutory provision that the director's decision on questions of fact shall be conclusive as meaning that it shall be conclusive unless unsupported by the evidence or arbitrary or capricious. In short, the same door is left open to judicial examination of the facts as in the Interstate Commerce Commission cases, but as in those cases, the court seems to limit the examination merely to determining whether there is enough evidence reasonably to supply a basis for the conclusion reached by the administrative agency.[5]

ONE of the most fruitful fields for examination of the way in which the Federal courts are dealing with issues of fact on review of administrative determinations is in their review of determinations of the board of tax appeals. The statutory provisions relating to review are meager. They simply provide that decisions of the board may be reviewed by the circuit court of appeals or the court of appeals of the District of Columbia, that such courts may adopt rules regarding the conduct of proceedings upon such review, that they shall have exclusive jurisdiction to review, and that the judgment of any such court shall be final except that it shall be subject to review by the Supreme Court on *certiorari*.[6] The courts have applied the same formula as in the Interstate Commerce and Veterans Cases. The opinions say that a decision of the board on an issue of fact should not be reversed because of the difference of opinion between the court and the board as to the weight of the evidence (Henderson Iron Works & Supply Co. *v.* Blair (1928) 25 F. (2d) 538) and that review of such decisions is limited to questions of law (Blair *v.* Curran (1928) 24 F. (2d) 390), but that since a decision on a question of fact without evidence to support it amounts to error of law, the appellate court will examine whether findings of fact by the board are supported by evidence. Usually the courts say that the findings must be supported by "substantial" evidence (Edson *v.* Lucas (1930) 40 F. (2d) 398); (Washburn *v.* Commissioner of Internal Revenue (1931) 51 F. (2d) 949); (Conrad & Co. *v.* Commissioner of Internal Revenue (1931) 50 F. (2d) 576); and sometimes they use the word "competent" evidence (Rusk *v.* Commissioner of Internal Revenue (1931) 53 F. (2d) 428); or "competent substantial evidence" (Budd *v.* Commissioner of Internal Revenue (1930) 43 F. (2d) 509). Accordingly, the court must search the record to determine the evidence upon which the board's finding is based. (Feick & Sons Co. v. Blair (1928) 26 F. (2d) 540.)

OCCASIONALLY this inspection of the record may reach a point which seems not unlike the weighing of the evidence by the court. Thus, in Planters' Operating Co. *v.* Commissioner of Internal Revenue (C. C. A. 8th, 1932) 55 F. (2d) 583, the issue was whether or not the board erred in refusing to assign any value to a certain hotel lease. The only evidence, other than circumstantial, that the lease had value was the testimony of three hotel men placed on the stand by the taxpayer. The board chose to disbelieve the testimony of these witnesses on the ground that it rested on certain erroneous assumptions. The appellate court reversed on the ground that the board erred, saying "we think the testimony of these witnesses should have been accorded weight." Again, in Dubiske *v.* Commissioner of Internal Revenue (C. C. A. 7th 1932) 58 F. (2d) 51, the decision of the board rested on the testimony of a particular witness. The appellant contended in the appeal proceeding that this witness was neither qualified nor competent and that his credibility was impeached by other witnesses and by certain facts. The court after reviewing the testimony in great detail reversed the board on this ground.[7]

If the statutory review provisions of the Veterans Relief Act and the Board of Tax Appeals Act are meager, it is interesting that in connection with some important parts of the Federal Water Power Act of 1920, provisions for judicial review are lacking altogether. The act, like the Radio Act of 1927, establishes a commission with power to issue permits and licenses for the construction of works for the development and improvement of navigation and the development and transmission of power, and sets forth certain conditions on which licenses are to be granted. Other sections provided for the revocation and renewal of such licenses.

THE act vests in the commission certain regulatory powers over the rates and practices of licensees and prescribes a *quasi* judicial hearing in connection with such regulation as well as with the application for a permit or license. It is provided that orders made by the commission in the exercise of its regulatory power over rates and practices shall be subject to the same review procedure as orders of the Interstate Commerce Commission (Sec. 20.) No express provision is made, however, for review of the acts of the commission in refusing to grant licenses or renewals. Furthermore, the commission is not itself given power to make cease and desist orders or to enforce in the courts its orders revoking licenses (Sec. 13). Instead, the act provides that the attorney general in certain cases may, and in others shall, upon request of the commission institute proceedings in equity to restrain violations of a license or to enforce revocation of a license for such violations (Sec. 26).

The cases under the Power Act have been too few in number to afford a guide as to the method of review procedure which will meet with the approval of the courts, or as to the conclusiveness with which they will treat determinations of the commission. In Ford & Son *v.* Little Falls Fibre Co. (1929) 280 U. S. 369, where a Federal license was in issue collaterally, the Supreme Court said that for the purposes of the case, it was unnecessary to go into the question of how far the commission's findings were conclusive.

IN the more recent Appalachian Power Case (C. C. A. 4th, 1933) 67 F. (2d) 451, the circuit court of appeals indicated that a suit to restrain enforcement of the act may not be brought against the commission, but must be brought if at all against the Attorney General, since he alone is vested by the act with power to proceed for its enforcement. At one point in its opinion the court said: "The suit is not one against the commission for the purpose of reviewing its action; and it is not contended that jurisdiction to exercise such review has been granted to the courts" (p. 454). However, at a later point, the

court assumes the possibility of a judicial review of the exercise of the power of the commission on the ground that its finding is not supported by the evidence, but states that in such a proceeding the United States would be a necessary party because such a suit would be in effect a suit against the United States (p. 456).

Another Federal statute which contains only a casual provision for attacking an administrative order in court otherwise than by defense to a court proceeding to enforce such order is the Shipping Act of 1916, which provides that all orders of the board shall continue in force for not to exceed a certain period, unless suspended, modified, or set aside by court of competent jurisdiction. Apparently only one proceeding of this character has been brought and this did not go beyond the district court in which it was instituted. Certain water carriers sought to enjoin an order of the Shipping Board requiring them to cease and desist from the practice of giving as low a rate on split delivered lots as on carload lots. (Isthmian S. S. Co. *v.* United States (Dist. Ct. S. D. New York, 1931) 53 F. (2d) 251.) The court did not employ the usual formula to the effect that an administrative finding is conclusive if supported by evidence. They examined the whole record and announced their conclusion that "the weight of all the evidence is to the effect that the cost of split deliveries substantially exceeds that of deliveries in carloads lots. . . . In our opinion there can be no doubt that the administrative action of the board was within its powers."

THE Packers and Stockyards Act of 1921 [8] and the Grain Futures Act of 1922 [9] contain full and detailed provisions for review. The Grain Futures Act makes it unlawful to use the facilities of the mails or of interstate commerce for or in aid of sales of grain futures except where such sales are made upon a board of trade which has been designated by the Secretary of Agriculture as a licensed contract market. A statutory commission, consisting of the Secretary of Agriculture, the Secretary of Commerce, and the Attorney General, is authorized after notice and hearing, to suspend or revoke such license as well as the trading privileges on any such licensed market of persons who violate certain regulatory provisions of the act by attempting to manipulate the market price of grain, etc. Where such an order of suspension or revocation has been made, the affected board of trade or individual may appeal to the circuit court of appeals. It is interesting to note that, intentionally or unintentionally, the language describing the appellate procedure differs for appeals by a board of trade from that used for appeals by an individual trader. For the appeal by a board the statute provides:

> The testimony and evidence taken or submitted before such commission and duly certified and filed as aforesaid as part of the record, shall be considered by the court as the evidence in the case. . . . The court of appeals may modify or set aside the order of the commission or may direct it to modify its order. No such order shall be modified or set aside by the circuit court of appeals unless it is shown by the board of trade that the order is unsupported by the weight of the evidence or was issued without due notice and a reasonable opportunity having been afforded to such board of trade for a hearing, or infringes the Constitution of the United States, or is beyond the jurisdiction of the said commission.

THE act then provides that an appeal on the same terms shall lie from a refusal of the Secretary of Agriculture to designate any board of trade as a contract market.

The procedure on appeal by an individual whose trading privileges have been suspended or revoked by the commission is described as follows:

> The person against whom such order is issued may file in the U. S. Circuit Court of Appeals a written petition praying that the order shall be set aside. A copy of such petition shall be forthwith served upon the commission by delivering such copy to its Chairman or to any member thereof and thereupon the commission shall certify and file in court a transcript of the record including the evidence received. Upon the filing of the transcript the court shall have

jurisdiction to affirm, set aside, or modify the order of the commission and the evidence of the commission as to the facts, if supported by the weight of the evidence, shall in like manner be conclusive.

Among other differences it may be noted that on the appeal by the trader it is not expressly provided that the transcript of the administrative hearing shall be considered as the evidence on appeal, although there would hardly seem to be any doubt that the statute would be so construed. What is more important is that in both instances, the statute provides that the order shall be sustained only if supported by the *weight of the evidence* and not merely if supported by evidence, or by substantial evidence. This would seem to impose on the reviewing court the duty of deciding between conflicts in the testimony, and reaching its own independent conclusions of fact.

THE review provisions of the Grain Futures Act have so far been applied in only one case, Board of Trade of Chicago *v.* Wallace (C. C. A. 7th 1933) 67 Fed. (2d) 402. This was an appeal from an order suspending the Board of Trade for refusal to admit a certain coöperative to trading privileges. The court set the order aside and remanded the case to the commission, on the ground that the latter had acted without evidence as to certain characteristics of the coöperative which the court held were essential to determine the legal obligation of the Board of Trade to admit it.

The cases under the Packers and Stockyards Act have been more numerous. The first part of this statute declares certain practices on the part of packers engaged in interstate commerce to be unlawful, such as unfair discrimination, the granting of unreasonable preferences to any person, or locality, or the engaging in any practice for the purpose or with the effect of manipulating prices. The act authorizes the Secretary of Agriculture, after notice and hearing, to issue against any packer, subject to the act, a cease and desist order requiring him to refrain from any of the forbidden practices. A packer against whom such an order has been issued may appeal to the circuit court of appeals. It is then provided that the evidence taken before the Secretary shall be the evidence on appeal and the court may affirm, modify, or set aside the order of the Secretary. Nothing is stated as to the grounds of review or as to the weight to be attached to the Secretary's findings of fact.

THE second part of the act deals with stockyards and with dealers and "market agencies" who operate in connection with stockyards. The statute requires the rates charged at all stockyards to be filed with the Secretary of Agriculture and authorizes the Secretary, after notice and hearing to prescribe just, reasonable, and nondiscriminatory rates and practices and to require compliance with the same by cease and desist order. The Secretary is also authorized to make reparation orders corresponding to the reparation orders made by the Interstate Commerce Commission. The language used in the review provisions of this section of the act is apparently taken from the Interstate Commerce Act. Thus it is provided that if any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money, the Secretary or the Attorney General may apply to the district court, and if after hearing the court determines that the order was lawfully made and duly served, the court shall enforce the order by injunction or other appropriate process. It is also provided that the party against whom such order is issued may have the same set aside in the courts.

In applying these appellate provisions the courts, no doubt taking their clue from the language, have expressly followed the precedents applicable to orders of the Interstate Commerce Commission. Thus in Farmers' Livestock Commission Co. *v.* United States (Dist. Ct. E. D. Illinois, 1931) 54 F. (2d) 375, the court said:

An administrative order such as that in question is valid provided there is sufficient evidence to support it.

The court then viewed the evidence which it found to be wholly circumstantial, but reached the conclusion that as to the majority of petitioners the Secretary's order was supported by substantial evidence. As to two of them, however, there was held to be no substantial evidence to support the order, and as to them it was set aside.

THE power of the Secretary under the Stockyard Act to fix rates and charges of stockyards has been held to be subject to the constitutional requirement that the rates shall yield a fair return on the fair value of the property, and there is thus introduced the whole problem of valuation with its issues of constitutional fact. The more recent cases, accordingly, present side-by-side in interesting fashion, the contrasted situations of administrative fact determinations reviewed merely for their statutory validity and other fact determinations in the same case reviewed for their bearing on a constitutional issue. In Tagg Brothers and Moorehead *v.* United States (1929) 280 U. S. 420, the Secretary suspended a tariff of increased rates filed by the market agencies at a stockyard. The petitioner applied for and the government consented to an interlocutory injunction and the appointment of a special master before whom there was introduced not merely the record in the proceeding before the Secretary, but oral evidence besides. The lower court considered the additional evidence as well as the administrative record, but nevertheless dismissed the bill. On appeal to the U. S. Supreme Court the petitioners claimed that the order of the Secretary was void because unsustained by the evidence before him. The court said: "We find in the evidence before the Secretary ample support for the findings and conclusions reached by him." Furthermore, the court held that the introduction of new evidence before the master was erroneous, saying:

A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo*. The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right—a matter which need not be considered or decided now.

FINALLY, the court pointed out that there was a contention that the rates prescribed were confiscatory and said:

Whether the additional evidence before the master was admissible on the issue of confiscation presents a serious question of practice which was not argued by counsel. The lower court after considering the additional evidence reached the conclusion that the charges prescribed are not confiscatory. This conclusion of the lower court conforms in our opinion to the evidence. . . . The question of the admissibility of the additional evidence on the issue of confiscation may, therefore, be passed and is passed, without decision.

This language of the court seems to look forward definitely to the decision in Crowell *v.* Benson two years later and incidentally casts light on the scope and breadth of that decision.

In an interesting case arising after the decision in Crowell *v.* Benson, a bill was filed to enjoin a schedule of rates fixed by the Secretary as confiscatory. (Denver Union Stock Yard Co. *v.* United States (Dist. Ct. of Colo. 1932) 57 F. (2d) 735, P.U.R.1932C, 225.) The district court began its opinion by stating that the parties were in disagreement as to the scope of the judicial review, the petitioner contending that it was the duty of the court to try the case *de novo* and to exercise independent judgment upon all the questions of fact submitted to the Secretary for his determination. The respondent contended that review was limited to whether there was substantial evidence to support the Secretary's findings. The court then proceeded to distinguish between an attack upon an order upon the ground that it rests on an erroneous rule of law or on a finding made without evidence, or upon evidence which clearly does not support the finding, in all of which cases the attack must be deter-

mined upon the record of the administrative proceeding; and secondly, an attack made upon constitutional grounds where the rule of Crowell *v.* Benson was said to apply.

THE court pointed out that constitutional rights may be as successfully invaded by mistakes of fact as by mistakes of law, and concluded that where an invasion of constitutional rights is alleged, "we are compelled to hear the evidence and to decide for ourselves whether the order of the Secretary deprives petitioner of its property without due process of law." The court then proceeded to review in detail the valuation made by the Secretary and held his order unconstitutional on the ground that he erred in excluding certain properties from the rate base, in charging certain revenues to income, and in predicating the expected rate of return upon the experience of a single abnormal year.

Another case which was decided by another district court almost simultaneously, contains an interesting incidental discussion of the same issue which reaches substantially the same result.[10]

The Federal Radio Act of 1927 provided that any applicant for a permit or license or for the renewal or modification of a license whose application was refused by the licensing authority should have the right to appeal to the court of appeals of the District of Columbia, and any licensee whose license was revoked by the Federal Radio Commission should have the right to appeal either to the court of appeals of the District of Columbia or to the appropriate district court. On such appeal the record of testimony taken in the administrative proceedings should be filed in court, but either party might apply to the court for permission to present additional evidence. The court was to review and determine the appeal upon such record and evidence, and might alter or revise the decision appealed from and enter such judgment as to it might seem just (Act of February 23, 1927, Chap. 169, § 16).

THESE provisions came before the Supreme Court in Federal Radio Commission *v.* General Electric Co. (1930) 281 U. S. 464, on certiorari to review a decision of the court of appeals of the District of Columbia, which reversed an order of the Radio Commission. The Supreme Court held that the powers of review conferred by this statutory language on the court of appeals of the District were not judicial but of a supervisory administrative character such as could not be exercised by a constitutional court and that, therefore, it could entertain no appeal by certiorari or otherwise from the decision of the court of appeals.

To meet this decision the statute was immediately amended by Act of July 1, 1930, to provide that in the review proceeding the court should hear and determine the appeal upon the record before it and, to quote the statutory language,

> shall have power upon such record to enter a judgment affirming or reversing the decision of the commission . . . provided, however, that review by the court shall be limited to questions of law and that findings of fact by the commission if supported by substantial evidence shall be conclusive unless it shall clearly appear that the findings of the commission are arbitrary or capricious.

This provision came before the Supreme Court in Federal Radio Commission *v.* Nelson Bros. Bond & Mortg. Co. (1933) 289 U. S. 266, P.U.R.1933D, 465, and was held to satisfy the requirements of properly judicial review over the more or less novel argument that to be judicial in character a review proceeding must be entirely *de novo*.

THE lower court in applying the review provisions of the Radio Act, both before and since the amendment, has employed the familiar formula that the court will review the record to determine whether the commission's conclusion is supported by evidence. A formula which was very frequent in the radio appeal cases under the earlier form of the statute was that the decision of the commission would not be disturbed unless it was "manifestly

against the evidence." General Broadcasting System v. Federal Radio Commission (1931) 47 F. (2d) 426; KF KB Broadcasting Asso. *v.* Federal Radio Commission (1931) 47 F. (2d) 670; Journal Co. *v.* Federal Radio Commission (1931) 48 F. (2d) 461.

Under the amended statute the language more frequently used is that where the findings are supported by substantial evidence they are conclusive. Woodmen of the World *v.* Federal Radio Commission (1933) 65 F. (2d) 484. For the most part the court seems to have sustained the commission even as to findings involving views of public policy as in the famous Dr. Brinkley Case. (KFKB Broadcasting Asso. *v.* Federal Radio Commission, *supra.*) However, where an order rested upon a finding of the commission that four stations assigned to the same frequency as appellant station could be simultaneously operated without intolerable interference, the court held that such a finding was "manifestly against the evidence" because "theory must give way to fact." (Journal Co. *v.* Federal Radio Commission, *supra.*)

TURNING from Federal to state legislation, I shall briefly summarize the statutory provisions for the review of administrative determinations in three important fields of regulation: first, under the Workmen's Compensation Acts; second, under the "Blue Sky" Laws; and, third, under the Public Utility Acts.

The Workmen's Compensation Laws of eight states provide for their administration not through an executive agency, but directly through the courts. These states are New Hampshire,[11] Rhode Island,[12] Tennessee,[13] Alabama,[14] Louisiana,[15] New Mexico,[16] Kansas,[17] and Wyoming.[18] Under this type of procedure where the employer and the employee fail to agree on compensation the claimant, or in some states either party, may bring a court proceeding, which is in some states described as a proceeding in equity, for the determination of the amount due. Usually the statutes of this type contain some provision that the proceeding is to be summary and informal in character, and there is, as a rule, further provision for an appeal to a higher court. Provisions differ as to whether or not in either the original or the appeal proceedings the parties are entitled to demand a jury trial.

Where, as in the large majority of states, the administration of the Workmen's Compensation Laws is entrusted to an administrative agency, either an industrial commissioner, or commission, or Workmen's Compensation Board, the statutory provisions covering judicial review of the awards or orders of such agency follow a wide variety of forms. First of all may be put provisions which are very broadly expressed and supply few or no details beyond the fact that there shall be an appellate proceeding in a court of law. In this class fall the statutes of such states as Connecticut, New York, Virginia, Oklahoma,[19] and Nebraska.[20]

THE Connecticut statute merely provides that either party may appeal from an award by the commissioner to the superior court without stating the scope of review on such appeal.[21] The New York statute provides for an appeal to the appellate division of the supreme court, third department, and for a further appeal to the court of appeals where the decision of the appellate division is not unanimous or otherwise with the consent of the appellate division or the court of appeals, but nothing is said as to the scope of review.[22] Under the Virginia statute, as amended in 1924, an appeal lies from the commission to the court of appeals "in the manner now provided for appeals in equity cases from circuit courts," and it is further provided that the commission shall certify to the appellate court of the findings of fact upon which its action was based.[23]

Statutes which more specifically set forth the scope of judicial review may be divided into a number of groups. First may be placed those which ex-

pressly limit judicial review to questions of law or expressly exclude review of questions of fact, without further elaboration. In this group fall the statutes of Maine,[24] Massachusetts,[25] Michigan,[26] Indiana,[27] Idaho,[28] and South Dakota.[29]

THE type of statute which is most usual undertakes to enumerate the grounds on which an award may be set aside by the reviewing court. Practically all statutes of this type include three such grounds: first, that the commission acted without or in excess of its powers; second, that the award was procured by fraud; and, third, that the findings of fact made by the commission do not support the award. These are the only grounds specified in the Wisconsin law,[30] the Colorado law,[31] the Kentucky law,[32] and the Utah Law.[33] The Utah statute also provides that "the findings and conclusions of the commission on questions of fact shall be conclusive and final and shall not be subject to review; such questions of fact shall include ultimate facts and the findings and conclusions of the commission."

To these basic grounds of reversal a fourth is added in a number of other states, namely, that "there was not sufficient competent evidence in the record to warrant the making of the order." This is the language used in Missouri,[34] Iowa,[35] and Georgia.[36] The Pennsylvania[37] statute provides for the judicial reversal of a finding of fact "unsupported by competent evidence." The statutory phraseology employed in other states seems to authorize a somewhat wider independent judgment by the court on the evidence presented in the record. Thus the Arizona[38] statute provides that the court may review the evidence, the Minnesota[39] statute permits reversal on the ground that the order was "unwarranted by the evidence," while the Delaware[40] statute simply provides that the reviewing court shall determine the cause from the record without the aid of a jury. The California[41] act authorizes reversal on the ground that the order or decision is unreasonable.

OBVIOUSLY, all these various forms of expression give to the courts great latitude in determining whether to apply a broad or narrow scope of review. A recent study[42] by Charles Grove Haines of Los Angeles shows that within these different forms of language, the courts on the whole have tended to reach the same result. This result is in substance that they will always examine the record to determine whether it supports the findings. The measure of support on which they insist ranges widely from the mere requirement that there be at least enough evidence to enable a reasonable man to arrive at the result reached by the administrative agency to the extreme of requiring evidence which would convince the court itself of the correctness of the administrative conclusion. Between these extremes lies the whole range of reasonable doubt.

A few statutes definitely require the exercise of a broader reviewing power by the courts. Thus the Illinois statute provides for review by certiorari on all questions of law and fact with, however, the proviso that findings of fact shall not be set aside unless "contrary to the manifest weight of the evidence."[43] In New Jersey[44] it was originally provided that the review proceedings should take the form of a trial *de novo*, but by a later amendment the review is now confined to the administrative record. In Maryland[45] and Vermont[46] the review proceeding remains a complete trial *de novo* with a right reserved to either party to demand a jury. Ohio,[47] West Virginia,[48] Oregon,[49] and Washington,[50] also provide for jury trials.

A SECOND type of state legislation which affords interesting opportunities to study statutory provisions for judicial review is the so-called Blue Sky legislation for the prevention of fraudulent sales of securities. A number of states still adhere to the original

form of this legislation which did not operate through administrative action, but simply provided for the filing of reports, with criminal penalties for violations of the act. The newer type of legislation which has been adopted in the majority of states requires the registration and licensing of security dealers and frequently of security issues as well. These statutes display a wide variety of provisions for judicial review of administrative orders which deny or revoke such licenses or registration certificates.

In a number of states, including Ohio,[51] Illinois,[52] Virginia,[53] Rhode Island,[54] Vermont,[55] and Arizona,[56] the statutory language supplies no details as to scope, procedure, record, evidence, and similar specific matters. In Michigan [57] and South Dakota [58] it is simply provided that review shall be by certiorari. The Massachusetts [59] Act provides for review of an order of the commission by the superior court and the supreme judicial court, but only to the extent of the unlawfulness of such order. Apparently the Massachusetts statute contemplates that review shall be confined to the face of the administrative record. In Pennsylvania [60] and Kentucky [61] review is likewise limited to the record in the administrative proceeding, but these statutes do not in any way define or restrict the scope of the matters reviewable and the Kentucky statute expressly requires the reviewing court "to specifically direct said commissioner as to his further action in the matter," thus in substance authorizing the court to supplant with its own judgment the judgment of the official as to the administrative action to be taken.

In California [62] and Nebraska [63] the scope of review is expressly limited by the statute to the single question of whether there has been an abuse of discretion on the part of the administrative agency in making the order appealed from. However, the evidence is not restricted to the administrative record and any new pertinent evidence may be introduced. In Wisconsin [64] an order of the commission may be set aside in an action in the circuit court for Payne county on the ground that it is unlawful or unreasonable and the administrative record may be supplemented "by such different or additional evidence as the parties may introduce."

A very considerable number of the statutes follow a common form which provides for review by a complete trial *de novo* in court with the introduction of any evidence that the parties care to offer and with full power in the court "specifically to direct said commission as to its further action in the matter." With minor variations this is the provision in the acts of West Virginia,[65] Florida,[66] Indiana,[67] Oklahoma,[68] Iowa,[69] Colorado,[70] Utah,[71] Oregon,[72] and Washington.[73]

Another group of statutes provides that the appeal shall take the form of a suit in equity to vacate and set aside the administrative order on the ground that it is unjust and unreasonable, and that the court shall have power to set aside, modify, or confirm said order as the evidence and rules of equity may require. Substantially this form of provision is found in the statutes of Alabama,[74] Kansas,[75] Missouri,[76] North Dakota,[77] Montana,[78] and New Mexico.[79]

Still another and briefer statutory form provides in substance that the appellate court after receiving the appeal may "make such order and decrees as the equities and exigencies of the case may require," [80] or "as justice may require," [81] or "as may seem equitable." [82]

Maryland [83] and North Carolina [84] both afford opportunity for a jury trial in the review proceeding to determine all the issues of fact, and the North Carolina statute specifically provides that such judgment shall be rendered by the court as the findings of the jury may require.

I come finally to the statutory provisions now in force governing review of the orders of public service commissions. I have had opportunity to an-

alyze the statutes of only those eighteen states which are now covered by the service of the Commerce Clearing House, but the analysis, incomplete as it is, discloses points of interest. In three of the states, Texas,[85] Ohio,[86] and Maine,[87] the nature and scope of the proceeding for review is defined in the statute in only the barest outline with the result that a free field is open to the courts to mould the proceeding in its essential features. The Maine statute, however, clearly contemplates restriction of review to questions of law which must be raised by exceptions to the ruling of the commission.

ANOTHER group of statutes, while leaving many of the phases of review procedure unprovided for, are specific on two points,—first, that the review proceedings must be on the administrative record and that no new or additional evidence may be introduced, and second, that the power of the reviewing court is limited to affirming or setting aside the order under review, or else remanding the cause to the commission for further action. This type of procedure is found in Missouri,[88] Idaho,[89] and in the Iowa [90] statutes governing motor carriers. These statutes contain no express provisions as to the scope of review on the facts.

Two statutes explicitly limit review to questions of law,—the Massachusetts statute which provides that the supreme judicial court shall have jurisdiction to review, modify, or annul any ruling of the commission, but only to the extent of the unlawfulness of such ruling,[91] and the California statute which provides that the review shall not be extended further than to determine whether the commission has regularly pursued its authority and that its findings on questions of fact shall be final [92] The California statute also contains an express provision that the cause shall be heard on the record of the commission as certified by it and that no new or additional evidence may be introduced in court. The statute, however, goes on to provide that where the validity of any order is challenged on the ground that it violates a right under the Constitution of the United States, the court shall exercise an independent judgment on the facts, and the findings or conclusions of the commission material to the determination of such constitutional question shall not be final.[93]

SIMILAR to the California statute, though less detailed, is the statute of New Jersey which provides that the supreme court shall review orders of the board and set aside any order in whole or in part when it clearly appears that there was no evidence before the board reasonably to support it, or that the order was beyond the jurisdiction of the board.[94]

The question of the right to introduce new evidence in the judicial review proceeding has been met by a compromise provision, which has been adopted in a number of states. This compromise, which has been enacted in Wisconsin,[95] Maryland,[96] Michigan,[97] Indiana,[98] and Oregon [99] is to the effect that if on the judicial review either party wishes to introduce evidence different from that offered upon the hearing before the commission, the court shall transmit such new evidence to the commission and stay further proceedings until the commission shall have reported back. If the commission shall then rescind the order complained of, the court proceedings shall be dismissed. If it shall alter, modify, or amend the same, the amended order shall take the place of the original and, judgment shall be rendered thereon as if made by the commission in the first instance. If the original order or determination shall not be rescinded or amended by the commission, judgment shall be rendered by the court on the original order.

IN a number of states the statute expressly provides that in the review proceeding the findings and conclusions of the commission on questions of fact shall be held to be only *prima facie* true, and that the court must exercise its independent judgment to determine the

weight of the evidence presented before the commission. This is the rule in Illinois [100] and Oklahoma [101] and it is applied in Pennsylvania by the amendment of the Public Utilities Act adopted by P. L. 1931, Chap. 172, to orders involving all questions of the reasonableness of rates, but only to such orders.

The Alabama [102] Public Utilities Act goes the whole way and provides that the review proceeding in court shall be a complete trial *de novo,* although the transcript of the evidence taken before the commission shall be admissible along with other evidence at the instance of either party. The same rule is applied in the Iowa [103] statute regulating interurban railways, and apparently also in the general act applicable to steam railroads.[104]

It would be interesting to follow the course of the decisions applying these various types of statutory provisions. Of course, under our law, it is the decisions purporting to apply the statute, rather than the statute itself which ultimately govern. For that reason, in our analysis and studies we often tend to ignore the statute altogether. Yet, the statute must inevitably to some extent, and does in fact to a considerable extent, influence and guide the decisions. This is my excuse for this elaborate but still incomplete summary of statutory provisions which I have put before you. It is a summary which at least for its interest in the way of comparisons and contrasts I should like to see carried on and made more complete by other hands.

Citations

[1] See article by J. Wallace Bryan in 41 American Law Review, pp. 809 ff.

[2] Texas & P. R. Co. *v.* Interstate Commerce Commission (1896) 162 U. S. 197 at 239.

[3] Denver Union Stockyard Co. *v.* United States (Dist Ct. of Col. 1932) 57 F. (2d) 735, P.U.R.1932C, 225.

[4] For a criticism and discussion of the possible limitations of the doctrine of the case, see my article in 80 University of Pennsylvania Law Review (June, 1932), pp. 1,055 ff.

[5] See also Hines *v.* Starnes (D. C. App. 1928) 26 F. (2d) 997. By the so-called Economy Act of March 20, 1933, § 5, it is provided that all decisions by the Administrator of Veterans' Affairs (the successor of the Director of the Veterans' Bureau) shall be "final and conclusive on all questions of law and fact and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision."

[6] Act of February 26, 1926, Chap. 7, §§ 1001, 1003; U. S. C. A., §§ 1224, 1226.

[7] Compare also Budd *v.* Commissioner of Internal Revenue (C. C. A. 3d 1930) 43 F. (2d) 509.

[8] Act of August 15, 1921, Chap. 64, 7 USCA, § 191 ff.

[9] Act of September 21, 1922, 7 USCA, § 1 ff.

[10] St. Joseph Stockyards Co. *v.* United States (Dist. Ct. W. D. Missouri, 1932) 58 F. (2d) 290.

[11] Public Laws of 1926, Chap. 178, §§ 25 to 30, inclusive.

[12] General Laws of 1923, Chap. 92, §§ 1239 to 1249, inclusive.

[13] Acts of 1919, Chap. 123, § 32.

[14] Act of 1923, § 7571.

[15] Acts of 1926, No. 85.

[16] 1917 Session Laws, Chap. 83.

[17] Acts of 1917, Chap. 226, §§ 11–21, inclusive.

[18] Compiled Statutes of 1920, Chap. 258, §§ 4327, 4328; Acts of 1925, Chap. 124 amending Compiled Statutes 1920, Chap. 258, § 4328.

[19] Compiled Statutes of 1921, Chap. 56, § 7297.

[20] Compiled Statutes of 1922, § 3062.

[21] General Statutes of 1918, Chap. 284, § 5366.

[22] New York, Cahill's Consolidated Laws, 1930, Chap. 66, § 23.

[23] Act of 1924, Chap. 318.

[24] Acts of 1919, Chap. 238.

[25] General Laws of 1921, Chap. 152, § 11.

[26] First Extra Session of 1912, Act No. 10, Part 3, § 12.

[27] Acts of 1917, Chap. 63, § 3.

[28] Compiled Statutes of 1919, § 6270; Acts of 1921, Chap. 217.

[29] Compiled Laws of 1919, § 9475.

[30] Wisconsin Statutes, Edition of 1923, § 102.23.

[31] Acts of 1919, Chap. 210, § 98.

[32] Acts of 1916, Chap. 33, § 52.

[33] Laws of 1921, Chap. 67, § 3148.

[34] Act of 1925, § 44.

[35] Code of 1924, § 1453.

[36] Acts of 1920, No. 814, § 59.

[37] Act of 1919, No. 277, § 427.
[38] Acts of 1925, Chap. 83, § 90.
[39] Act of 1921, Chap. 82.
[40] Act of 1919, Chap. 203, 3193 (r), § 111.
[41] Acts of 1917, Chap. 586, § 66 (a).
[42] "Essays on the Law and Practice of Administration in Honor of Frank J. Goodnow," Baltimore, 1935, p. 127 ff.
[43] Acts of 1925, § 19(L).
[44] Acts of 1918, Chap. 149, § 19; Acts of 1921, Chap. 229, § 7.
[45] Annotated Code of 1924, Art. 101, § 56.
[46] General Laws of 1917, Chap. 241, § 5807.
[47] Throckmorton's Annotated Code, 1934, § 1465–90.
[48] Acts of 1919, Chap. 131, § 43.
[49] Laws of 1925, Chap. 133, § 6637.
[50] Remington's Compiled Statutes, 1922, § 7697.
[51] Laws of 1929, Chap. 216, § 24.
[52] Laws of 1921, p. 362, § 18.
[53] Laws of 1928, Chap. 529, § 13.
[54] General Laws, Chap. 273, § 12.
[55] Laws of 1929, Act No. 93, § 18.
[56] Revised Statutes of 1928, Chap. 38, § 1899.
[57] Consolidated Laws of 1929, § 9797.
[58] South Dakota, Laws of 1927, Chap. 206, § 29.
[59] General Laws, Chap. 110a, as amended by Laws of 1932, Chap. 290.
[60] Laws of 1929, Act No. 391, § 19.
[61] Laws of 1932, Chap. 17, § 43.
[62] Laws of 1931, Chap. 423, § 14.
[63] Revised Statutes of 1929, § 81–5418.
[64] Laws of 1933, Chap. 158, § 189.19.
[65] Laws of 1933, Extra Session, Chap. 41.
[66] Laws of 1931, Chap. 14899.
[67] Burns' Annotated Statutes of 1926, § 5025.
[68] Laws of 1931, Chap. 24, Art. 11, § 19.
[69] Laws of 1929, Chap. 10, Art. 18.
[70] Laws of 1931, Chap. 95, § 5.
[71] Laws of 1925, Chap. 87, § 19.
[72] Oregon Code of 1930, § 25–1310.
[73] Laws of 1923, Chap. 69, § 16.
[74] Alabama Code, § 9895.
[75] Laws of 1929, Chap. 140.
[76] Laws of 1929, p. 387, § 21.
[77] Laws of 1923, Chap. 182, § 7.
[78] Revised Code, § 4038.
[79] Consolidated Statutes of 1929, § 32–706.
[80] Louisiana Laws of 1920, Act No. 177, § 12.
[81] Maine Revised Statutes of 1930, Chap. 57.
[82] Public Acts of 1931, Chap. 181, § 8.
[83] Annotated Code, Act 32 (a), § 13.
[84] Public Laws of 1927, Chap. 149, § 18.
[85] Revised Civil Statutes of 1925, Title 112, Chaps. 11 and 12, Art. 6453.
[86] General Code of 1931, § 544.
[87] Laws of 1931, Chap. 116.
[88] Revised Statutes of 1929, § 5234.
[89] Code of 1929, § 59–620.
[90] Code of 1931, § 5105–a21 to § 5105–a24.
[91] General Laws of 1921, as amended, Chap. 25, § 5.
[92] Public Utilities Act of California, § 67.
[93] California Laws of 1933, Chap. 442, § 1.
[94] Public Laws of 1918, Chap. 130.
[95] Statutes of 1927, § 196.44, Amended Laws of 1929, Chap. 504, § 270.
[96] Code of 1924, Art. 23, § 405.
[97] Compiled Laws of 1929, § 11042.
[98] Acts of 1927, Chap. 258.
[99] Code of 1930, Art. 61, § 256.
[100] Public Service Commission Act, § 68.
[101] Constitution, Art. 9, § 22.
[102] Alabama Code, § 9831.
[103] Act of 1927, Title 18, Chap. 379, § 8232.
[104] Act of 1927, Title 18, Chap. 368, § 7887.

Coördinated Transport—The Dawn of a New Era

By J. R. TURNEY*

COMMERCE is one of the bases upon which civilization rests—a trait without which man would quickly sink to a level little higher than that of the animals. This is true because specialization in labor is indispensable to progress, trade prerequisite to specialization, and transport essential to trade.

"Commerce," said the great Chief Justice, "is intercourse." [1] Fortunate indeed it was that at the very threshold of this nation's history, its statesmen realized that the wider and freer this intercourse, the greater the spiritual and material prosperity of the nation, as well as its potentiality for permanent contribution to the good of mankind. Without this concept, it might well be that the cluster of maritime provinces which had straggled along the Atlantic Coast for three centuries would never have begun that magnificent march from sea to sea, which was to result, in

* From an address by the former director, Section of Transportation Service, Federal Coördination of Transportation.

a little over a century, in a land where there are no frontiers.

The steam railroad was the physical agency which made this development possible and which, over this period, has integrated forty-eight politically independent and sovereign states into a single nation, economically and socially.

Railroads initially were little more or less than carters, serving local trade areas. They multiplied until in the last half of the Nineteenth Century they numbered over a thousand. As the territory which they served expanded, these carriers extended their lines by construction and acquisition, but their corporate individuality has always persisted.

EVEN as late as 1866 it was thought necessary for Congress to enact a statute in order to make interchange of traffic between these carriers permissible.[2] It was necessary for several decades to pass in which economic integration struggled with provincialism before mandatory interchange of traffic between carriers became a national policy. During and following this period, the tendency for railroads to unify to form larger and more comprehensive systems proceeded rapidly until arrested by the theory of enforced competition, which ruled American political thought during the closing years of the Victorian Era.[3]

Although consolidation reduced the number of railway carriers to about one hundred cognate systems, railway integration fell far short of keeping pace with the coalescence of commerce. Today, as large and as wide-flung as these carrier units are, less than one fourth of their freight traffic is local. The remainder requires the service and coöperation of two or more lines. Herein lies the heart of the present railroad problem. Under the system of corporate independence, individual carriers handle this predominant joint traffic by the same facilities and in precisely the same way as they handle traffic local to individual railroads. The result is a service stagnated by terminal delays and so wasteful that the economic supremacy of the railroad as a transport medium is menaced. The problem which challenges the statesmen in the industry as well as in the government is to integrate the handling of joint traffic.

PRESENT integration of facilities and services, so imperatively demanded for efficient handling of this joint traffic, is negligible. Some integration of the traffic functions has come about from legal requirements for and regulations of through routes and rates, but even here coöperation has been so modified by "the right of individual action" that progress is at the pace of the most reactionary management or at that of the most harebrained, depending largely upon which is the more headstrong.

The extent to which the integration of commerce demands a parallel integration in the conduct of the transportation machinery was brought home to us by the emergency of the World War, which quickly revealed that a united nation at war could not adequately be served by a loosely-knit federation of railroads. American achievement in organizing and providing men and materials for the successful prosecution of the war was made possible only by the complete integration of railroad management and facilities into a single, cohesive transport machine.

The result of the lack of coherence in the performance of joint functions by railroads has been accentuated by the renaissance of two of their ancient rivals—the waterway and the highway. In the case of the latter particularly, the unparalleled rapidity with which the facilities and operations multiplied, the lack of intercarrier organization,[4] the lack of order in charges, to say nothing of discriminations and rebates, all have combined to produce chaos. Further we find that corporate capacity [5] and regulatory policy,[6] as well as the natural aversion to try new and alien instrumentalities, also have contributed in preventing the welding of the several types of transportation into a single system.

An integrated system of transport is demanded by the necessities of the economic as well as the military security of the nation. America stands alone as the single example of an industrial empire built on inland transportation. All competitors which we must meet in the world markets are predominantly maritime nations. For our industry to compete upon even terms in the markets of the world, a quick, serviceable, and cheap transportation is absolutely essential. To obtain that transportation, the national welfare demands the best possible combination of all transport facilities.

Transportation, of necessity, is a public or a social function, rather than an individual or private function. Our laws have been founded upon the concept—sometimes expressed but more frequently implied—that the exploitation of the facilities of transport is a public and not a private franchise,[7] although this country has found it desirable that this franchise be privately operated. There should be no private nor vested right in this public service, nor to the advantages of location or the traffic which accrues in performing it. Being a public franchise, the primary objection of transportation is to serve the public, to facilitate commercial intercourse among our people and with foreign nations. To the fundamental proposition that the public is better served by a privately owned and operated transport system than by a public one, there is an inescapable corollary. Private gain in the conduct of transportation should be subordinated always to the public service.[8]

The nation has the right to demand of all operators of transport facilities that, to develop commerce, they point their service to meet every need of traders, equitably adjust prices to encourage the largest possible movement of goods profitably, be alert to adopt every possible improvement in facilities and service of every type or mode, and permit others to use their facilities or they themselves use the facilities of others, wherever efficiency and economy of the industry as a whole be thereby promoted, even perhaps at the sacrifice of individual advantage.[9]

This by no means implies nationalization or socialization. No private enterprise can function efficiently or serviceably except at a profit. Neither owners nor employees will contribute capital or labor essential to its continuance unless both are adequately compensated and their respective positions made reasonably stable and secure. The nation can do no greater disservice to itself and to its citizens than to suffer its transport to become impoverished or pauperized. So long as the public chooses to secure the benefits of private operation of transport, it must be prepared to safeguard that operation with the constitutional guaranties which apply to protect private property.[10]

Two wholly different objectives have actuated government control. The first, and until recent years by far the more important was the protection of the private citizen against extortion, discrimination, or injury—the potentiality of which is inherent in a system of mass transportation. The second objective is the promotion of the national welfare by development of an efficient and serviceable means of transport. The attainment of these objectives has been sought by three distinct methods, which at times have proved to be incompatible. These methods may be termed—enforced competition, regulation, and coördination.

Pursuant to the principles of *laissez faire* which then predominated, the early attempts to control carriers were directed toward compelling them to compete with one another. The theory is that the fewer laws the better and that the public is best protected by leaving carriers to struggle with one another until the unfit are wiped out by the law of "inherent economic efficiency." The experiment, in so far as sole reliance was placed upon it, was short lived. The prime essentials that carrier rates be certain and equal were con-

trary to the basic premise of competition, as was also the necessity for constant agreement among the carriers with respect to joint rates and services. The chaos following free competition of the eighties was in no small measure the cause for the enactment of the Act to Regulate Commerce. Since that time we have seen the carriers endeavoring to function under two largely incongruous policies—enforced competition under the Sherman Act and enforced coöperation under the Interstate Commerce Act.

There are those who urge that the development of the past few years, whereby shippers have been enabled to obtain transportation by means of pipe line, vessels, and still more recently by motor truck, so that they are no longer dependent upon the services of the railroads, has eliminated the need for all regulation, except to make competition between different types of transport fair. When this is done, it is claimed that the law of inherent economic efficiency should be permitted to operate without artificial barriers. The proponents of these views look upon transport as a game or contest between rival transport systems to determine which shall survive and not as a public service in which the question of who or what provides the service is but a minor consideration.

THE important question is not the agency by which the service shall be performed, but the instrumentality or the combination of instrumentalities which will perform the task with the greatest celerity and economy. Competition between different types of transport facilities leads inevitably to the attempt by each agency to perform services for which its instrumentalities are inferior to those of a competing agency, thereby impairing the service and burdening the nation's commerce. There are fields within which the motor truck, the motor bus, the railway, the waterway, or the airway, severally, economically is respectively superior to all other forms of transport. Competition causes each of these carriers to dissipate its advantages in its own field, in a futile endeavor to overcome those of a rival in another field. Only by the judicious combination of these different instrumentalities of commerce into a single integrated system of transport can the full potentialities of each be realized by the nation.

In ordinary business affairs, competition in price is the chief protection which the public has against extortion. Price competition, by definition, contravenes the basic laws of transportation —equality, publicity, and certainty. A revival of rate discrimination and preferences, which free price competition implies, is unthinkable. Nor is price competition between agencies necessary to give the public the advantage of the most economical type of transport. The newly arisen ability of the shipper to provide his own transportation imposes a direct limitation upon the prices which any carrier—railway, highway, or domestic waterway—may charge for its service.

TRANSPORT facilities have been so multiplied that their capacity is far greater than any likely demand therefor. Unrestrained competition, whether between carriers of the same type or between carriers of different types, leads inevitably to the competitive duplication of plant and services, and is an evil in both its positive and negative results. The positive evil is the burden which the unnecessary multiplication of plant or services casts upon transportation. The negative evil is the tendency by agreement, often tacit, for all carriers to forego improvements in plant or services because of the expense which others would incur to duplicate them, in which case the public is deprived of the improvements.

Competition, however, when kept within reasonable bounds, is inherently beneficial. Nothing will keep an organization on its toes so thoroughly. The fact that the service must be sold, not merely delivered, tends constantly to make competitive carriers seek better

or more efficient instrumentalities for performing their services, or to install new services to create or develop new business, rather than to filch it from one another. So long as private profit remains the incentive for carrier service, competition, restrained within reasonable limitations, must also continue if the service is to be kept efficient and economical.

THE history and extent of carrier regulation in this country is too well known to require repetition. It is needful to inquire what if any changes in policies are indicated by the new conditions. There may be a temptation to oversimplify the problem. The situation does not involve merely the advent of a new carrier operating by a different kind of instrumentality. If that were all, the obvious remedy would be to subject the new agency to the same regulation as the old. A much more fundamental and novel situation has arisen, in which carriers of all types are now challenged by private transport.

Heretofore transport has of necessity required common effort; that is, it has been inherently a social or group function. Within the recent past however, there have occurred two phenomena which for the first time in modern history have made individual or private transportation possible. The first was the integration of industrial enterprises into units sufficiently large to warrant private transportation. This tendency is to be particularly noted in the case of the petroleum industry, which has invested huge sums in pipe lines and tankers, chiefly for the private transportation of their owners' products. The same development has taken place in the steel industry, with respect both to raw and finished products. The second and far more important phenomenon was the development of the single unit highway motor vehicle, which enables practically all shippers to provide their own transportation.

THESE phenomena have had and will continue to have a tendency to bring about tremendous changes in the pricing policies of carriers, since the cost of the individual transportation constitutes a ceiling beyond which, from an economic standpoint, the carrier's prices may no longer extend. On the other hand, because of this maximum, for the first time, the carriers economically are required to recognize a minimum charge—their own increment or marginal cost of providing the service. The price field delimited by these maximum and minimum limits is much narrower than that in which carriers have heretofore operated. The fact that from an economic standpoint, carrier prices must be confined within this delimited field, coupled with the ability of the shipper to provide his own transportation, has greatly lessened the necessity for the stringent public regulation to protect individuals against extortions, discrimination, or injury. Paradoxically, the situation has brought an insistent demand that the same type of regulation be extended to the new forms of transportation, not so much for the purpose of protecting the public, as for protecting the carriers against one another. Carriers of different types contest hotly over the extent of this regulation. That their interests are identical rather than hostile is well exhibited in the two appendices of the current Report of your Special Committee.[11] If the names of the subscribers be omitted, I question whether a neutral reader could say which of the appendices was submitted by counsel for highway carriers and which by counsel for railway carriers. Two considerations show that the matter is a common economic problem rather than a *casus belli, viz.:* (1) The competition which threatens carriers of all types is not that of one another, but that of the traveler's own automobile or the shipper's own truck, neither of which will be greatly minimized by legislation, and (2) the welding of all instrumentalities into a single transport system is inevitable, and punitive taxation or regulation in time will rise to plague its present proponents.

COINCIDENTALLY with the lessening in the need for regulation to protect individuals, there has arisen a much greater need for a new form of public control to foster and protect the nation's commerce. The field in which this new control must function is that which lies beyond the jurisdiction of the individual carrier. The integration of the nation's commerce and industry demands a parallel integration in the transport machine which serves it. At the present time the great bulk of the commerce requires the joint agreement or action of two or more carriers. As the competing instrumentalities are welded into a single system, a greater and greater degree of coöperation between carriers will be required. It is significant that in the stress of excess traffic produced by the war, as well as that of insufficient traffic resulting from the recent economic debacle, this voluntary coöperation failed. Examination reveals that most of the great wastes in railroad transportation center in the failure of one hundred separate and distinct carrier systems to integrate their joint functions. This is particularly true of their pricing, marketing, terminal, and interchange activities.

THE suggestion is frequently made that coördination be attained by consolidation. Many if not most consolidation plans overlook the fact that from an economic and operative standpoint, the integration of joint services is more important than the elimination of parallel services, and hence that continental systems would be inevitable. It may be that such consolidation in time must be made, but prior thereto there must be found a formula by which large and unwieldy systems need not be operated by isolated or diffused managements, or be unresponsive to local needs and policies.

Consolidation goes further than required by present exigencies. All that is now necessary is a means to integrate conjoint functions in a carrier agency dealing exclusively with common matters, leaving all other functions to the independent companies. Conjoint functions are those which can be exercised only by joint carrier action or the exercise of which will directly affect other carriers or the industry as a whole. Specifically, these functions include interchangeable equipment, rate making, and publication, scheduling, unification of redundant services and facilities, research, standards, and marketing.

These conjoint matters, while legally within the sphere of an individual carrier corporation, in fact are exterior to it, since they equally affect the interests of other carriers. Adequate integration through the coöperation of the individual corporations is out of the question. The management of each corporation owes a single and individual loyalty to it. It cannot be expected voluntarily to subordinate its interests to those of the industry. This has proved true with respect to one hundred railroads and will be equally true of the thousands of new carriers which have recently come into the picture. A central agency for the industry or perhaps initially for each form of transportation, with plenary and exclusive powers over these conjoint matters, is indispensable.

THE assignment of these functions by the carriers to a single joint agency will raise many legal questions for which the profession must find the answer. The doctrine of special corporate capacity obviously must be abandoned if a single corporation is to engage in transportation by all means of transport. The right of an individual corporation, under present laws, to surrender to a joint carrier agency the exclusive power of rate making, unification of services and facilities will surely be questioned. But if the carriers are to continue as private enterprises, which I for one devoutly believe they should, our profession can be relied upon to find the way by which these things can be done lawfully.

The part which the government is to play in this new era demands reconsideration, so that our control machinery

shall be designed to attain its objectives. With respect to the protection of private rights, it is necessary to decide when a given charge or service is unreasonable or discriminatory. The promotion of commerce deals with carrier policies and practices with respect to service, charge structure and level, tariffs, equipment, securities, finances, statistics, accounts, construction and extension, abandonments, and consolidation.

THE original and predominating occasion of regulation was the protection of the individual user against extortion, discrimination, or injury. To attain this objective, proceedings are essential which are *inter partes*, judicial, and in which the rights and obligations of the shipper or of a community are weighed upon the one hand, and those of the carrier upon the other. Procedural necessity often makes it difficult if not impossible that the rights of any except parties be considered or adjudicated. Such proceedings differ in basic principles not at all from an ordinary judicial proceeding, in which the conflicting claims of the parties litigant are adjudicated. The attempt to mix questions of public policy in such proceedings is predestined to failure.

Control to secure an efficient and serviceable system of transport does not deal with parties litigant and is not judicial in its nature. It is largely administrative and economic, rather than judicial or political. Private citizens other than the carriers are rarely involved, and the carrier is involved not so much in its capacity as the owner of private property as that of the operator of a public franchise, in which operation, of course, it is entitled to the full constitutional protection of its property.

THE present commission form of regulation is as admirably fitted for deciding the *quasi* judicial controversies—for which it was originally intended—as it is wholly unfitted for the executive or administrative type of control, which coördination requires. Questions of executive policy are best settled by an administrator, rather than by a court. Courts are properly limited to a narrow and special record and rarely may take into account the broader viewpoint of public policy or interest which matters of this kind requires. Their function is to adjudge between conflicting claims of contestants, whereas the function of the executive is to plan or choose between policies and to act quickly and thoroughly when once the plan is perfected or the choice made.

This does not imply arbitrary action. If the rights of an individual be prejudiced by such a decision, he should be afforded an opportunity for judicial review. But this review should relate not to the public policy involved in the administrator's decision, but to the legality of any particular action flowing therefrom, claimed to infringe private rights. The reassignment of administrative functions to one or more executives implies no extension of government control, and indeed should pave the way for relaxation in present control, the degree of which should depend upon the ability of the carriers to function serviceably, efficiently, and adequately through their new joint agencies.

THE claim that coördination is a matter solely for private agreement between carriers or for their own private agency is patently without merit. The interest of the public in an efficient and modern system of transportation is far more comprehensive and vital than that of the private operator. The latter's interest therein is confined to the financial result and it may well be that at times will appear incompatible with improvement or modernization. The means, methods, or service which are of importance to the operator only as they affect profits are of the utmost importance to the national security, economic and military. Further, past experience in which carriers attempted to coördinate by voluntary associations demonstrates their futility and the necessity for a govern-